APPENDIX

MEMORANDUM OPINION

(Filed September 28, 1967)

CHRISTIE, District Judge.

KIND OF ACTION

This is a civil action originally instituted by William M. Culbertson, Jr., a member of a partnership known as Whitewood Smokeless Coal Company, formerly engaged in mining and shipping coal in Buchanan County, Virginia, for the purpose of requiring defendants to account for the proceeds of sale of Whitewood's coal, shipped during the period July 1, 1948 to December 31, 1955, less the agreed selling commisions, and to recover the amount due, with interest, and punitive damages.

During the period July 1, 1948 to June 15, 1954, Whitewood Smokeless Coal Company, a partnership consisting of J. H. Franks and William M. Culbertson, Jr., was engaged in mining coal in Buchanan County, Virginia, which coal it delivered in railroad cars at its tipple to defendant, Jno. McCall Coal Company, Inc., Whitewood's alleged sales agent, hereinafter referred to as McCall. J. H. Franks became ill about June 15, 1954, and retired from the partnership, and thereafter William M. Culbertson, Jr., continued to mine coal under the name of Whitewood Smokeless Coal Company, which coal was likewise delivered in railroad cars at Whitewood's tipple to McCall. Culbertson contends that when Franks ceased working and withdrew from the partnership in 1954 he and Franks entered into an agreement by the terms of which he, Culbertson, took over all of the assets of the partnership, consisting largely of obsolete mining equipment, and assumed and paid Whitewood's debts and liabilities. During the period July 1, 1948 to December 31, 1955, Whitewood delivered to McCall a total of 245,011.35 tons of coal which was sold, or otherwise disposed of, by McCall.

Contending that all of the above-mentioned tonnage of coal was sold by McCall as Whitewood's exclusive sales

agent and that McCall had not accounted for the sales prices, less agreed selling commissions, Culbertson instituted this action against defendants for the purpose of determining whether McCall did properly account to Whitewood for the proceeds of sales of its coal, less the agreed selling commissions, and to recover from the defendants the amount due and owing by McCall, with interest. Culbertson also asks that McCall be required to return the commissions received by McCall on certain sales with respect to which McCall did not properly account, and to pay punitive damages.

J. H. Franks was adjudicated a mental incompetent by the Circuit Court of Russell County, Virginia, on November 4, 1966, and Cora Franks and J. C. Franks were appointed the committee for J. H. Franks. Thereafter, on motion of Culbertson, and by an order entered herein on July 25, 1967, J. H. Franks and Cora Franks and J. C. Franks, his committee, were made involuntary plaintiffs herein. This order was entered over the objection of defendants, and Cora Franks and J. C. Franks, committee for J. H. Franks.

The Complaint filed herein alleges that during the period July 1, 1948 to December 31, 1955, there was a written agreement between Franks and Culbertson, doing business as Whitewood Smokeless Coal Company, and defendant, C. A. Clyborne, by the terms of which it was agreed that C. A. Clyborne, or his assignee, as exclusive sales agent for Franks and Culbertson, would use all reasonable and diligent efforts in selling and disposing of Whitewood's coal at the best available market prices, and would account to Whitewood for the proceeds of sale of said coal, less the agreed selling commissions; that shortly thereafter C. A. Clyborne assigned said sales agency agreement to McCall; that during the period July 1, 1948 to December 31, 1955, pursuant to said sales agency agreement, Whitewood delivered to McCall 245,011.35 tons of coal; that McCall sold said coal, but wilfully and intentionally misrepresented to Whitewood the sales prices of said coal and wilfully and intentionally underpaid Whitewood for its coal.

The Answer filed on behalf of defendants alleges that during the period June 1947 through January 1949, McCall

paid to Whitewood the prices received by McCall for Whitewood's coal, less the agreed selling commissions. The Answer further alleges "that effective February 1, 1949, by mutual agreement, the agency portion of said Exclusive Distributorship Agreement was terminated, and that thereafter the said Jno. McCall Coal Company, Inc. *purchased* the coal from the plaintiff, trading as Whitewood Smokeless Coal Company, at prices agreed upon between the parties from time to time, and which prices were thereafter paid by Jno. McCall Coal Company, Inc. to the said Whitewood Smokeless Coal Company in the ordinary course of business."

The Answer also pleads the 5 and 10 year Statutes of Limitations and alleges that the Complaint fails to state a claim against any of the defendants upon which relief can be granted.

Thus, the two questions now before the Court are, first, whether "the agency portion" of the agreement, dated June 20, 1947, was terminated by mutual agreement of the parties as of February 1, 1949, as contended by defendants, and if not, second, whether plaintiffs' claim is barred by the 5 or 10 year Statute of Limitations.

If, as contended by defendants, the so-called "agency portion" of the agreement was terminated by the mutual agreement of the parties as of February 1, 1949, then following such termination Whitewood was not concerned with the prices received by McCall for the Whitewood coal, and there was no duty on McCall to account to Whitewood or to permit Whitewood to examine its books and records. If, however, as contended by Culbertson, the agency portion of the agreement was *never* terminated, then the question remains whether the 5 or 10 years Statute of Limitations bars plaintiffs' claim against defendants. The answer to this last question depends upon whether Franks and Culbertson, during the statutory period, whichever is applicable, knew, or in the exercise of reasonable care should have known, that McCall was misrepresenting to Whitewood the prices received for Whitewood's coal and was wilfully and intentionally underpaying Whitewood for its coal.

Neither side demanding a jury, the case was tried to the Court without a jury.

Description of Parties and Jurisdictional Facts

Defendant Jno. McCall Coal Company, Inc. is a Maryland corporation, with its principal office in Baltimore, Maryland, and is qualified to do business in the State of West Virginia. Its principal business is the buying and selling of coal and the selling of coal for various coal companies on a commission basis.

Defendant Clyborne, Inc. is a West Virginia corporation, with its principal office in Bluefield, West Virginia. It is engaged in the business of buying and selling coal and acts as agent for McCall, and possibly other companies, in the sale of coal. Defendant C. A. Clyborne, is a resident and citizen of Bluefield, West Virginia, and is president and manager of Clyborne, Inc. He and his wife own practically all of its stock.

Plaintiff Culbertson is a resident and citizen of the town of Raven, Virginia, and involuntary plaintiff J. H. Franks is a resident and citizen of Swords Creek, Virginia.

Diversity of citizenship of the parties thus appears, and since the amount in controversy well exceeds $10,000.00, exclusive of interest and costs, requisite federal jurisdiction exists. 28 U.S.C.A. § 1331. The substantive law of West Virginia applies. Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188.

Statement of Facts

1. Execution of "Exclusive Distributor," or Sales Agency, Agreement, Dated June 20, 1947, and Assignment Thereof by C. A. Clyborne to McCall.

By virtue of a written lease, dated June 20, 1947, from J. H. Franks and defendant C. A. Clyborne, to Culbertson and Franks (plaintiffs' Exhibit No. 1), the latter were given the right and privilege of mining, by deep mining methods, the Cary seam of coal located in the M. D. Hinton Tract

of approximately 1,100 acres of land, and the Gillespie Tract of 2.314 acres of land, all of which land was located in Buchanan County, Virginia. In consideration of such mining rights, Franks and Culbertson agreed to pay to Clyborne and Franks, as lessors, certain royalties on all coal mined.

The said lease agreement further provided as follows:

> "It is further covenanted and agreed between all the parties herein and by the Lessees that C. A. Clyborne or his assignee shall be the EXCLUSIVE DISTRIBUTOR for the entire output of all coal mined and produced from all of the tracts of land under this lease during the entire life of this lease and any renewal thereof;
>
> "The said C. A. Clyborne as EXCLUSIVE DISTRIBUTOR covenants for himself and his Assignee that he will use all reasonable and diligent efforts in selling and disposing of said coal at the best available market price; in consideration of said services as EXCLUSIVE DISTRIBUTOR, the said C. A. Clyborne or his Assignee shall receive a *sales commission* of Twenty Cents (20¢) per net ton of two thousand (2,000) pounds of all coal sold. In the event that market conditions become such that the selling expenses for handling this coal increases or selling costs can be shown that justify any change, the said C. A. Clyborne as distributor or *sales agent* shall receive eight per cent (8%) of the realized price on any coal sold as *sales commission.*"

The above-mentioned agreement was prepared by LeRoy Katz, Bluefield, West Virginia, defendants' attorney.

Shortly after the execution of said agreement, defendant C. A. Clyborne, orally assigned to McCall such rights as he, Clyborne, had thereunder to act as "exclusive distributor," or "sales agent," for Whitewood's coal. Following said oral assignment, McCall designated defendant Clyborne, Inc. as its agent to sell the Whitewood coal, and agreed to pay Clyborne, Inc. 70% of the commissions received from

Culbertson and Franks. McCall retained 30% of the commissions received.

2. SHIPMENTS OF COAL BY WHITEWOOD TO McCALL SUBSEQUENT TO AGREEMENT OF JUNE 20, 1947, AND McCALL'S METHOD OF ACCOUNTING TO WHITEWOOD.

Following the execution of said lease and agreement, dated June 20, 1947, and the assignment of the exclusive distributorship or sales agency portion of the agreement, by C. A. Clyborne to McCall, Whitewood commenced delivering coal to McCall in cars at railroad sidings in Buchanan and Tazewell Counties, and during the period July 1, 1948 to December 31, 1955, Franks and Culbertson, during the continuance of the partnership, and Culbertson thereafter, delivered to McCall 245,011.35 tons of coal, and McCall sold said coal and made monthly settlements with Whitewood. During the entire period July 1, 1948 to December 31, 1955, pursuant to an agreement between McCall and Whitewood, it was customary for McCall to make weekly advances to Whitewood for the purpose of enabling Whitewood to meet its payroll and other operating expenses, Tr. 366-7, and once a month — usually on the 20th of each month — the advances were deducted by McCall from the amounts found by McCall to be due and owing to Whitewood, and a check for the balance was sent by McCall to Whitewood. According to Culbertson's testimony, once a month Whitewood would get a batch of mine statements and a check for the amount of the settlement up to that time. Attached to the check was a voucher showing the various orders that had been shipped out. The check supposedly represented the total amount due Whitewood, less advances, up to that time, Tr. 367-8.

During the period July 1, 1948 to February 1, 1949, defendants say that McCall accounted to Whitewood as an "exclusive distributor" for the sales price of Whitewood's coal, less the agreed selling commissions. However, as above pointed out, defendants contend that as of February 1, 1949, the "exclusive distributor" portion of the agreement was terminated by mutual agreement of the parties, and that there-

after McCall *purchased* Whitewood's coal as a wholesaler at prices agreed on from time to time. Defendants further say that subsequent to February 1, 1949, McCall paid to Whitewood the agreed purchase price of the Whitewood coal; that, therefore, subsequent to February 1, 1949, it was of no concern to Whitewood what prices McCall actually received for the Whitewood coal, and defendants frankly concede that subsequent to February 1, 1949, McCall did not account to Whitewood for the sales price of Whitewood's coal, less selling commissions, as an exclusive distributor, but rather as a wholesaler for prices agreed.

Culbertson, however, contends that the lease and agreement dated June 20, 1947, created an agency relationship between Whitewood and McCall, Clyborne's assignee, and denies that this agency relationship was ever terminated. Culbertson contends that it was McCall's duty, during the entire period July 1, 1948 to December 31, 1955, to account to Whitewood for the proceeds of sale of Whitewood's coal, less the agreed selling commissions.

3. THE PROCEDURE FOLLOWED BY MCCALL IN THE SALE OF WHITEWOOD'S COAL AND IN ACCOUNTING TO WHITEWOOD.

Of the 245,011.35 tons of coal shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955, approximately one-half thereof was sold by McCall to General Services Administration, a department of the United States Government. The procedure for the handling of such sales to General Services Administration was as follows: McCall, after being authorized in writing so to do by Whitewood, entered into contracts with General Services Administration for the sale of the coal from the Whitewood mine. Prior to the making of such contracts, it was customary and necessary for McCall to furnish General Services Administration with a telegram or letter, signed by Whitewood, authorizing McCall to enter into such contracts.

Following shipments of coal by McCall to General Services Administration, McCall's Baltimore office forwarded invoices for the coal to General Services Administration, and

General Services Administration forwarded its checks in payment of the invoices to McCall's office at Baltimore. McCall then once a month mailed a check to Whitewood covering the total amount determined by McCall to be then due and owing to Whitewood, less the advances made by McCall to Whitewood up to that time. However, at no time was Whitewood furnished with copies of invoices mailed to General Services Administration.

McCall's procedure for handling sales of Whitewood's coal to persons, firms and corporations other than General Services Administration, and in accounting to Whitewood, appears to have been as follows: Following the shipment of coal by Whitewood, McCall's Bluefield office prepared and mailed invoices on McCall's stationery to the purchasers, sending copies of such invoices to McCall's Baltimore office. The purchasers of the coal would then mail their checks to McCall's Baltimore office, and McCall would then once a month mail its check to Whitewood covering the amount determined by McCall to be due and owing to Whitewood, less advances made by McCall to Whitewood to date. However, Whitewood was not furnished with copies of the invoices mailed to the purchasers of the coal.

Although McCall never furnished Whitewood with copies of invoices mailed to McCall's customers, it was customary for McCall, during the entire period July 1, 1948 to December 31, 1955, to mail to Whitewood copies of orders for coal on blue printed forms. See plaintiffs' Exhibit No. 23, being two completed orders for coal. The copies of orders sent by McCall to Whitewood were each dated and numbered, and were addressed to Whitewood Smokeless Coal Company, Raven, Virginia, and directed Whitewood to ship a certain number of cars of certain grades of coal to McCall at either Portsmouth, Ohio; Roanoke, Virginia; or Bluefield, West Virginia scales.

The copies of orders showed the "price" of the coal referred to in the order, except in a few cases when the price was left open. In cases where the price was shown, it was shown in several different ways as follows: "Price 5.10 less 25¢ per net ton f.o.b. car mines", or "Price 5.00 per net ton f. o. b. car

mines", see plaintiffs' Exhibit No. 23. In certain cases, the price was shown as follows: "Price 7.20 less 20¢ per net ton f. o. b. car mines", or "Price 6.25 less 8% per net ton f. o. b. car mines."

Plaintiffs' Exhibit No. 16, entitled "Whitewood Smokeless Coal Company Resume of Coal Shipped to Jno. McCall Coal Company 1948-1955," which was prepared by Jack Persinger, a certified public accountant, from copies of the blue order forms and white mine sheets, forwarded to Whitewood by McCall, shows in detail how the "Price" on each shipment was reported by McCall to Whitewood. According to the testimony of Culbertson and Persinger, it is possible that some of the copies of orders and mine sheets may have been lost or misplaced by Whitewood and, therefore, plaintiffs' Exhibit No. 16 does not purport to show *every* shipment of coal by Whitewood to McCall. However, the exhibit is sufficient to indicate the pattern followed by McCall in reporting the "Price" of the coal in question to Whitewood during the period July 1, 1948 to December 31, 1955. During this entire period, the printed portion of the blue order forms and white mine sheets remained the same, and it was only necessary for McCall, in ordering coal and sending copies of mine sheets to Whitewood, to fill in the blanks on these printed forms.

It will be observed from an examination of plaintiffs' Exhibit No. 16, being a Resume of Coal Shipped to Jno. McCall Coal Company 1948-1955, that the first order, numbered B-5473, dated January 1, 1948, called for Whitewood's "output after 1-3" of lump coal. The price shown was "Sales price less 8%." Nevertheless, no coal was shipped on this order since Whitewood did not commence producing coal until July 1948, Tr. 335-8.

The next order referred to in plaintiffs' Exhibit No. 16 was order number B-4391, dated July 22, 1948, which called for Whitewood's "output" of run-of-mine coal. The price was shown as follows: "Sales price less 20¢." Thereafter, and until September 23, 1948, the "Price" was shown as a certain price "less 20¢."

Commencing on September 23, 1948 and continuing throughout the remainder of 1948, the prices were shown as certain prices "less 8%."

During the period February 1, 1949 to August 16, 1949, sixteen orders showed certain prices "less 8%," and during the same period, thirty orders merely showed the net prices without reference to any deductions. For instance, "Price 5.10 per net ton f. o. b. car mines," or "Price 7.00 per net ton f. o. b. car mines." During the period January 1, 1949 to August 16, 1949, on two orders no price whatever was shown.

During the period August 16, 1949 to September 1, 1951, with two exceptions, only net prices were shown, with no reference to deductions or commissions. The exceptions were an order dated May 13, 1950, showing the price of $4.00 per net ton less 20¢, and an order dated July 6, 1951, on which no price whatever was shown.

During the period September 6, 1951 through 1954, however, with only a few exceptions, the prices shown on the orders and mine sheets were certain prices "less 25¢." Instances of this kind were as follows: "Price 5.10 less 25¢ per net ton f. o. b. car mines." See plaintiffs' Exhibit No. 23. The exceptions were seventeen orders which merely showed net price with no reference to deductions or commissions.

During 1955, all orders and mine sheets showed merely net prices with no reference to deductions.

Defendants contend that the different methods of reporting prices, as shown on plaintiffs' Exhibit No. 16, support their contention that from February 1, 1949 through 1955, McCall *purchased* Whitewood's coal at prices agreed on from time to time and refute Culbertson's contention that the agreement of June 20, 1947, created an agency relationship and that such agency relationship was never terminated. Defendants point to the numerous instances subsequent to February 1, 1949, in which only net prices were shown without reference to any deductions, and say that this manner of reporting prices is consistent only with a purchaser

and seller relationship and is inconsistent with the alleged agency relationship. Defendants further say that McCall's practice of reporting net prices in many cases was notice to Whitewood that McCall was *purchasing* Whitewood's coal and was not selling Whitewood's coal as sales agent, or at least was sufficient to put Whitewood on inquiry.

However, Culbertson points out that the prices shown on the orders and mine sheets from July 22, 1948 to September 14, 1948 showed certain prices "less 20¢" per ton, which was the commission McCall was entitled to receive under the agreement of June 20, 1947. Culbertson further points out that, pursuant to the agreement of June 20, 1947, McCall increased its commission from 20¢ per ton to 8% of the selling price, and insists that he understood that McCall deducted 8% of the selling price from September 23, 1948 until the early part of September 1951, when, by agreement, the commission was reduced from 8% of the selling price to 25¢ per ton, and from the date of such reduction he, Culbertson, understood that McCall was deducting 25¢ per ton for its commission, and accounting to Whitewood for the balance.

Culbertson testified that when he received copies of the orders and mine sheets from McCall, showing merely net prices with no deductions, he assumed that McCall had deducted its selling commission and that, to enter the transactions on Whitewood's books, he then reconstructed McCall's figures and determined the amount of the commission so as to ascertain the price for which McCall sold the coal, Tr. 339. Culbertson stated that his reason for reconstructing McCall's figures in Whitewood's books and showing McCall's commission and the prices McCall received for the coal was that he had to determine the gross selling price of the coal in order to take depletion in Whitewood's income tax returns, Tr. 352-3.

An examination of Whitewood's books, plaintiff's Exhibits Nos. 19 and 20, would indicate that the books are authentic and that the entries therein were made at or about the time of the transactions.

Culbertson was asked if, upon receiving copies of orders and mine sheets showing net prices with no deductions, he inquired of Clyborne whether McCall had deducted its commission from the price shown. Culbertson replied that he made no such inquiry, but assumed that McCall's commissions had been deducted, Tr. 339, 346-7. Culbertson further testified that frequently Clyborne would call him on the phone and advise him that McCall had a certain price for so many tons of coal; Culbertson would say all right and would ship the coal. If, when Whitewood received a check for the coal, it was for *less* than the price quoted by Clyborne on the phone, he, Culbertson, assumed that Clyborne had deducted McCall's commission, Tr. 346-7.

4. THE MANNER IN WHICH MCCALL RECORDED ITS TRANSACTIONS WITH WHITEWOOD ON ITS BOOKS AND RECORDS.

McCall's books and records have not been introduced in evidence or examined by plaintiffs, but it appears from the testimony of John McCall, Jr., Tr. 185, and statements of counsel for defendants that during the entire period in controversy — July 1, 1948 to December 31, 1955 — there was no change in the method in which McCall entered its various transactions with Whitewood on its books or in the manner in which McCall accounted to Whitewood, Tr. 185. During the entire period in controversy, McCall regarded itself as the *purchaser* of Whitewood's coal, also regarding itself as such even prior to the alleged modification of the agreement of June 20, 1947. According to counsel for defendants, "a distributorship involves a purchase of coal and a resale of coal, so naturally it is recorded on your (McCall's) books as a purchase of coal and a resale of coal," Tr. 28. Counsel for defendants also say, Tr. 34-5, "The details of those orders were entered on McCall's books and they were entered with exactly the same procedure, by the same people, after January of 1949, as before, because there was no reason to change the method of entry. It's the contents that change, not the method of making the entry."

5. THE ALLEGED MODIFICATION OF THE WRITTEN AGREEMENT DATED JUNE 20, 1947, UNDER WHICH McCALL OBTAINED WHITEWOOD'S COAL.

As above pointed out, defendants contend that the written agreement, dated June 20, 1947, under which McCall sold Whitewood's coal, was, by mutual agreement, modified as of February 1, 1949, and thereafter McCall *purchased* Whitewood's coal, as a wholesaler, at prices agreed on from time to time. Since it is defendants' contention that prior to the modification of the written agreement, it also *purchased* Whitewood's coal, it is not quite clear why McCall would wish to so modify the contract. However, defendants do contend that the written agreement was so modified as of February 1, 1949.

On the other hand, Culbertson denies that he or Franks ever agreed to such modification of the agreement and denies that such modification was ever discussed. Therefore, since the real relationship existing between McCall and Whitewood during the period in controversy is the controlling issue in this case, it becomes necessary to consider the evidence bearing on this issue.

Clyborne testified that about August 1, 1948, Culbertson began complaining about the prices received by Whitewood for its coal, Tr. 69, 74-6; that since about August 1, 1948, Culbertson had been complaining "relentlessly" about prices, Tr. 68; that in view of Culbertson's constant complaints and in order to promote harmonious relations with Whitewood and in order to give Whitewood the right to accept or reject orders, he, Clyborne, suggested to Culbertson and Franks that thenceforth McCall would *purchase* Whitewood's coal as a wholesaler, at prices agreed on from time to time, and such an agreement was entered into between Franks, Culbertson and Clyborne, effective February 1, 1949, and such agreement continued in effect throughout the remainder of the period in controversy. Clyborne's testimony concerning the alleged modification of the agreement is rather voluminous, Tr. 67-103.

Clyborne testified that he was "sure" he had, on one occasion, in his office at Bluefield, West Virginia, discussed with Franks the termination of the "exclusive distributor" relationship, Tr. 123-4. Clyborne was then confronted with his discovery deposition, taken April 7, 1966, from which it appeared that he did not remember *where* the alleged conversation occurred, whether in Bluefield or Buchanan County, or whether it was a telephone conversation, Tr. 125-7. Asked to explain the apparent inconsistency in his testimony, Clyborne said, "I dug back in the researches (sic) of my mind and discussed it with my associates * * *", Tr. 125-6.

Clyborne further testified that pursuant to his agreement with Franks and Culbertson, he wrote a letter, dated January 28, 1949, to Whitewood Smokeless Coal Company — plaintiffs' Exhibit No. 28 — which reads as follows:

"Gentlemen:

"Confirming conversation with Bill today.

"Our mutual friend Bill has frequently complained about prices. So as a means of maintaining harmonious relations and in line with his request following, as stated, his discussion with you it is agreeable with me for us to mutually disregard the *Agency* clause of the contract and I will handle your output in the capacity of a wholesaler, effective four days hence — February 1st.

"Accordingly our buying orders will be sent to you concurrently with sales of your coal and you shall have the option to accept or reject them. Of course, my exclusive distribution rights are retained."

Clyborne, however, did not recall sending a copy of this letter to McCall's Baltimore office, Tr. 82, and Culbertson denied that Whitewood received the letter or that Whitewood agreed to any such modification of their business relationship as set forth in the letter, Tr. 328. Franks has been mentally incompetent for several years, and his deposition indicates clearly that he has no recollection whatever of the matter involved in this litigation.

Clyborne also testified that after Culbertson had made a claim against McCall in the latter part of 1964, he searched for copies of the letter in question in his files for about two weeks, but was unable to locate them, but that he did find two carbon copies of the letter in question in his safe at Bluefield, Tr. 83-6; that the reason he put the carbon copies in the safe was that "we try to keep all important papers in the safe," Tr. 84, and that this was "a very valuable letter," Tr. 87. He testified that he took the two carbon copies of the letter with him to Baltimore in the latter part of 1964 and showed them to his attorney, Tr. 85, but that he later lost or misplaced the carbon copies, Tr. 83-4; that the carbon copies did not indicate that he mailed a copy of the letter to McCall at Baltimore, Tr. 87. However, before losing or misplacing the two carbon copies of the letter, Clyborne said he made "10 or 12 (photographic) copies of the copy," Tr. 84-6. In explaining how he lost the two carbon copies, Clyborne said, "I had them (2 carbon copies) all in a batch of papers in a clothes box, and going over these different papers and making notes," Tr. 85.

Clyborne insisted that the only reason he had for suggesting a modification of the written agreement of June 20, 1947, was to promote harmonious relations with Whitewood and to enable Whitewood to agree on prices in advance, and to reject orders that it did not desire to fill, Tr. 68-9, 74-7. Clyborne said that following the modification of the agreement, McCall and Whitewood would "agree on each specific order," Tr. 75. However, the evidence indicates rather clearly that Whitewood never at any time, either prior or subsequent to the alleged modification, rejected an order or refused to ship. See Clyborne's testimony, Tr. 79, 82, 123, 130-2, and Culbertson's testimony, Tr. 345-6.

Clyborne's testimony with reference to the manner in which McCall ordered coal from Whitewood subsequent to February 1, 1949, is somewhat inconsistent and contradictory. For instance, in certain parts of his testimony, Clyborne says that McCall and Whitewood would, in nearly every instance, agree on the price in *advance*, and before McCall mailed the order to Whitewood, Tr. 80-1, 120-1. Clyborne was later

asked in what manner Whitewood advised McCall that an order was accepted, to which he replied that such acceptance would be indicated by Whitewood by starting shipments on the order, Tr. 122, 132.

Clyborne was asked on cross examination why, if McCall was the *purchaser* of Whitewood's coal subsequent to Februrary 1, 1949, the orders sent by McCall to Whitewood and the mine sheets prepared by McCall continued, in many cases, to show certain prices "less 8%," or certain prices "less 25¢," and Clyborne's explanations, which are somewhat inconsistent and contradictory, appear on pages 109 to 120 of the transcript. These explanations are as follows: "It is a method of trading," Tr. 109; "Well, different firms have different ways of doing business and that is one of *our* characteristics of doing business * * *. Different *operators* have different ideas about trading. It is as variable as the rainbow," Tr. 110; "Custom and practice. We buy coal like that all the time, according to the view of the operator, the way *he* operates. Each one of them have a M.O., a modus operandi. We try to gear ourselves to that," Tr. 116.

We continue to quote from Clyborne's testimony:

> "Q. Why go to all the writing and the mathematics when you're buying coal as a wholesaler to show a certain price less 8% or less twenty-five cents? Why not show the price? A. Well, if you can show me how to conduct my business more satisfactorily, I would be glad to have you come down and show me. I am not trying to be sarcastic either (T. 118).
>
> "Q. Well, what did you mean — I am going to ask you once more — what did you mean then when you said, 'We try to gear ourselves to the modus operandi of the operator?' What did you mean by that? A. Some operators like a variable pattern; some like a flat price; some less 6%, some like seven, and some eight, and it all depends on who it is. No one is alike in this world; they are all different, highly individualistic.
>
> "Q. What did Whitewood like? A. *Well, according to what the pattern unfolded, that is what he liked. It is clear to you. It is clear to me*" (T. 119).

Clyborne then testified that the several different methods of showing the prices of coal was "predicated on the different grades of coal," Tr. 120. However, it is quite clear from plaintiffs' Exhibit No. 16 that the alleged "modus operandi" could not have been predicated on the different grades of coal, since the deductions from the various prices related indiscriminately to *all* grades of coal. It is true that during the period July 22, 1948 to September 23, 1948, the deductions of 20¢ per net ton related only to run-of-mine coal. Nevertheless, from September 23, 1948 to January 1, 1949, the deduction of 8% on every order related to *all* grades of coal. The same is true during the period January 3, 1949 to August 16, 1949, in all cases where the 8% deduction is shown, and it is true during the entire period September 6, 1951 through December 31, 1954, where 25¢ per ton on *all* grades of coal was deducted.

Therefore, the modus operandi referred to by Clyborne could not have been predicated on the different grades of coal and, except for Clyborne's testimony, it does not appear that Whitewood had a modus operandi, or that it cared how the prices were shown on the orders and mine sheets — whether as net prices or as certain prices less 8% or less 25¢. So far as the evidence shows, Whitewood made no objection to the different methods by which McCall showed the prices of the coal.

6. The Correspondence in September 1951 Between McCall and Whitewood with Reference to the Reduction of McCall's Commission from 8% of the Selling Price to 25¢ Per Ton.

Culbertson, although denying that prior to February 1, 1949, he complained to McCall about prices, testified that prices began declining in 1950 and he did talk to Clyborne about prices in 1950. At that time, according to Culbertson, "We were in pretty bad shape," Tr. 330. On January 9, 1951, Culbertson wrote Clyborne — Defendants' Exhibit B — showing Whitewood's cost in producing coal, reciting the bad conditions existing in 1950, and advising that unless Whitewood got relief immediately, it would close down "until a favorable market shows up."

Culbertson further testified that in September 1951, he and Franks entered into an agreement with Clyborne, by the terms of which, effective September 3, 1951, McCall's commissions would be reduced from 8% of the selling price to 25¢ per net ton, Tr. 412-3, and that this agreement was confirmed by correspondence between Whitewood and McCall — plaintiffs' Exhibits Nos. 4 and 5. Plaintiffs' Exhibit No. 4, a copy of a letter dated September 12, 1951, from Culbertson to R. E. Perkinson, one of McCall's employees in the Bluefield office, reads as follows:

> "Please refer to invoice dated September 11, 1951, order number B-6376 in regard to the price on these four cars shipped on September 3rd and 4th, respectively.
>
> "Mr. Franks advised me that effective September 3rd through the consent of Mr. Clyborne our coal would be sales price less 25¢ per ton commission, and in view of this fact the price on these cars shipped is $5.15 less 8% commission which nets $4.90 per ton."

Plaintiffs' Exhibit No. 5, a copy of a letter dated September 13, 1951, from Clyborne to Culbertson, reads as follows:

> "Your letter of September 12th.
>
> "The contract for 36,000 tons with the Government is on the basis of $5.10, as stated to you and Mr. Franks. Upon receipt of your letter, we checked the order, which was sent you in a routine way, and much to our surprise we note a typographical error was made — $5.15 instead of $5.10. While this is against us, we will let it stand. 25¢ from $5.10 is $4.85. Please take note accordingly."

While both Clyborne and Culbertson in this correspondence seem to have some difficulty with their arithmetic, it is clear that the two letters did confirm a previous agreement to the effect that McCall's "commission" would be reduced from 8% of the selling price to 25¢ per ton.

Clyborne testified that the agreement for the reduction of McCall's commission applied only to a 36,000 ton order from the government, and to that order alone, Tr. 135-9. To the

contrary, Culbertson testified that the reduction in commission effective September 3, 1951, applied to all future shipments. However, Clyborne's testimony that the reduction in commission applied *only* to the 36,000 ton government order for $5.10 per net ton comes under shadow, since the 25¢ commission was deducted on practically every shipment from September 3, 1951, the effective date of the agreement, through December 31, 1954, and the price at which the coal was sold during said period was not $5.10 per net ton, as shown in the government order, but was for greatly varying prices — See plaintiffs' Exhibit No. 16 — and the amount of coal shipped subsequent to September 3, 1951 (assuming that a railroad car would carry on 55 tons) would exceed 80,000 tons.

Therefore, the agreement, reducing the commission from 8% of the selling price to 25¢ per ton, obviously applied to orders other than the 36,000 ton government order and apparently applied to all future shipments.

John McCall, Jr., president of Jno. McCall Coal Comany since 1951, testified that he was not informed of the alleged termination of the "exclusive distributor" agreement until the latter part of 1964 and he did not see a copy of Clyborne's letter of January 28, 1949, until the latter part of 1964, after Culbertson had asserted a claim against McCall, Tr. 175-6.

However, Clyborne testified that in the year 1949, he advised John McCall, Sr., who was then president of Jno. McCall Coal Company, about the change in the relationship, Tr. 88. Clyborne was then confronted with his discovery deposition, taken April 7, 1966, from which it appeared that he then testified that it was not until after Culbertson asserted a claim against McCall that he, Clyborne, "disclosed to anyone connected with Jno. McCall Coal Company" that he had written the letter of January 28, 1949, Tr. 95-6. Clyborne's testimony concerning his conversation with John McCall, Sr. is vague and uncertain, and is insufficient to sustain a finding that Clyborne did report to McCall, Sr. the alleged modification of the agreement of June 20, 1947. Be that as it may, the mere reporting of the modification to McCall would not be binding on Whitewood if no such agreement had in fact been made with Whitewood.

As previously shown, Clyborne testified that Culbertson began complaining about prices about thirty days after Whitewood began shipping coal to McCall, and that Culbertson's constant complaints brought about the change in the relationship between McCall and Whitewood, Tr. 69. Culbertson denied such complaints and testified that the prices received by Whitewood for its coal up to January 28, 1949 were quite good; that Whitewood had no cause for complaint, and that he was well satisfied with the prices.

Plaintiffs' Exhibit No. 16, being a Résumé of Coal Shipped to Jno. McCall Coal Company 1948-1955, indicates that the first shipment of coal by Whitewood was on July 22, 1948. This exhibit may possibly indicate some slight decline in prices during the period of July 22, 1948 to January 1, 1949, but if there was an *overall* decline in prices, the decrease does not appear to have been substantial. Prior to August 22, 1948, there were sales of run-of-mine coal for prices ranging from \$7.20 less 20¢ down to \$6.50 less 20¢. Subsequent to August 22, 1948, the run of mine prices ranged from \$7.15 less 8% down to \$6.25 less 8%, and on one order for run of mine, the price was \$6.10 less 8%.

Plaintiffs' Exhibit No. 21, all of which except the last column was admitted in evidence without objection, shows what Whitewood earned and lost on its coal during the period 1948 to 1955. From this exhibit, it appears that during 1948, Whitewood shipped 16,849.55 tons, on which it earned a net profit of .956 per ton, which was more than twice what it earned in 1949 or 1950. In 1952, Whitewood made 8¢ per net ton, and in all other years it lost money. On the total of 245,011.35 tons shipped by Whitewood to McCall during the period 1948 to 1955 inclusive, Whitewood's average earning was .156 per ton.

An examination of plaintiffs' Exhibit No. 16 shows that there were nine different items subsequent to February 1, 1949 on which no price whatever was shown. On four of the orders, there was no reference to price; on three of the orders, the words "will advise" followed the word "price"; and on three of the orders "as advised" followed the word "price."

Plaintiffs' Exhibit No. 10 was a form letter prepared by McCall and mailed to Whitewood, with the request that Whitewood sign the letter and return it to McCall. This form letter, introduced in evidence without objection, reads as follows:

"John McCall Coal Company
Bluefield, West Virginia

"Gentlemen:

"*As exclusive sales agent* and distributor for our coal, you are authorized to offer all or any part of our tonnage to the State of North Carolina under Bid 51136 opening March 1, 1951 covering coal requirements for a period of twelve months ending March 31, 1952.

Very truly yours,

Whitewood Smokeless Coal Company

By: _____"

As previously shown, McCall entered into several contracts with General Services Administration for the sale of Whitewood coal. Contract No. TS-7981 covered the shipment of coal from July 1, 1948 to June 30, 1950. In that contract, the capacity in which McCall acted does not appear. Contract No. TS-20193, which covered the shipment of coal from July 1, 1950 to June 30, 1951, designated McCall as "exclusive sales agent." Contract No. GS-03S-419 covered the shipment of coal from July 1, 1951 to June 30, 1952, and in this contract McCall was likewise designated as "exclusive sales agent." Thereafter and in subsequent contracts, McCall was designated as "distributor."

It appears from the evidence that in two cases, Whitewood received from McCall substantial retroactive wage increases paid by the government, Tr. 144-5, 350-2. It further appears that during the period in controversy, McCall frequently incurred penalties on account of impurities in the Whitewood coal, and in its settlements with Whitewood, it deducted

these penalities from the proceeds of sale of Whitewood's coal, Tr. 351.

Clyborne testified that subsequent to February 1, 1949, Whitewood had the option of accepting or rejecting sales made by McCall; that "he (Whitewood) has the right of refusal if we couldn't match his price that some competitor offered him he could sell to others," Tr. 75. See Defendants' Exhibit F, copy of letter dated July 8, 1955, from Whitewood to Clyborne.

As above pointed out, the evidence shows, however, that Whitewood never in fact rejected an order sent to it by McCall or refused to ship. Neither does it appear that Whitewood ever sold its coal to another at a better price than that offered by McCall, although it does appear that Whitewood *purchased* some Cary seam coal, and sold it to others.

7. ADMISSIBILITY OF EVIDENCE OFFERED BY CULBERTSON OF McCALL'S DEALINGS WITH PINE OAKS COAL CORPORATION.

Culbertson offered in evidence an agreement between McCall and Pine Oaks Coal Corporation, dated October 25, 1955 — plaintiffs' Exhibit No. 11 — under which McCall purported to act as "exclusive distributor" for Pine Oaks Coal Corporation. In this agreement, McCall undertook to use its best efforts to resell Pine Oaks coal for the best price obtainable, and for its services McCall was to receive 6% of the sales prices. The agreement between McCall and Pine Oaks was substantially the same as the agreement dated June 20, 1947 between McCall and Whitewood, except that in the Pine Oaks contract McCall was to receive only 6% of the sales prices.

Culbertson then offered to show by Clyborne that from 20 to 25 blue order forms sent by McCall to Pine Oaks showed certain prices "less 6%"; that on 24 of the orders, the price was shown as "Price 4.93 net . . . per net ton f.o.b. car mines," or some other price "net . . . per net ton f.o.b. car mines"; and on 4 of the orders, the prices were shown as "Price 4.70 per net ton f.o.b. car mines," or some other price "per net ton f.o.b. car mines." In 2 of the orders, no price

whatever was shown. In those orders, the words "will advise" followed the word "price," Tr. 160-3.

This evidence was offered by Culbertson for the purpose of proving that McCall was Pine Oaks' sales agent, and that McCall's method of showing prices in orders sent by it to Pine Oaks was similar to McCall's method of showing prices in the orders sent by McCall to Whitewood during the entire period July 1, 1948 to December 31, 1955. However, defendants objected to this evidence as being irrelevant. The Court reserved its ruling, allowing it to go in nevertheless for the benefit of the record. We now overrule the objection and find that evidence of the method in which McCall quoted prices under its sales agency agreement with Pine Oaks was relevant and material, since McCall pursued the same method in reporting prices to Whitewood under a like contract. This ruling will likewise apply to all the other objections made by defendants appearing in the record, relating to the testimony and exhibits offered by Culbertson in the Pine Oaks matter and on which rulings were reserved.

We reach this decision because it appears that the circumstances in the Pine Oaks case, as shown by the record, were so similar in nature and point of time to those of the instant case that they tend to show a general plan or scheme on the part of McCall to deceive. A detailed recital here of the facts and circumstances of the Pine Oaks case would seem to be unnecessary to a resolution of the issues involved in the case before us. Suffice it to say that Pine Oaks, becoming suspicious that McCall was not properly accounting to it, engaged counsel to take the matter up with McCall. Counsel so employed wrote McCall requesting permission to examine McCall's books. McCall responded by saying it was not indebted to Pine Oaks in any amount, but that Pine Oaks was indebted to it for an amount "largely in excess of the amount due for coal invoiced," plaintiffs' Exhibit No. 12, see also McCall's testimony, Tr. 194. Later, there was a conference between McCall, Clyborne, and their attorneys on the one hand, and Pine Oaks and its attorneys on the other, at which it was agreed that Pine Oaks could

audit McCall's books, Tr. 194-200. However, the next day McCall's check, dated December 20, 1961, for $33,671.05, payable to Pine Oaks Coal Corporation, was mailed out of McCall's Baltimore office to Pine Oaks, accompanied by a letter, plaintiffs' Exhibit No. 13. McCall posted on its ledger a credit memorandum in favor of Pine Oaks in the sum of $44,807.38, Tr. 194-5, indicating the advances it had made Pine Oaks against coal shipped amounted to only $11,136.33, leaving owing to Pine Oaks a balance of $33,-671.05, which Pine Oaks later accepted as a satisfactory adjustment of the account.

Some two years later, in 1963, Culbertson learned of this settlement in a chance conversation with R. E. Belcher, the president of Pine Oaks, Tr. 356 et seq., and as a result employed counsel after first making some investigation of his own.

It seems to be conceded by McCall that during the period 1955 to 1961, inclusive, it deliberately under reported to Pine Oaks the sales prices of Pine Oaks' coal. Its excuse for so doing was that it was thus protecting itself against advances made by it from time to time to Pine Oaks, but the wide difference ($33,671.05) which McCall later paid Pine Oaks in settlement demonstrates the absurdity of its contention.

All of the testimony concerning the sales of Pine Oaks' coal by McCall was offered by Culbertson for the purpose of showing that McCall perpetrated a fraud on Pine Oaks, similar to the alleged fraud perpetrated by McCall on Whitewood, and such testimony is now admitted into evidence and considered by the Court for that purpose only.

The law seems to be well settled that in civil cases, where fraud is an issue, evidence of other fraud of like character, committed by the same party, at or about the same time, is admissible to indicate a scheme, plan or design on his part broad enough to include the act in question. 20 Am. Jur. (Evidence) Sec. 303, pages 281-282, gives the general rule thusly:

> "The law in civil cases, as well as in criminal cases, permits proof of acts other than the one charged which

are so related in character, time, and place of commission as to tend to support the conclusion that they were part of a plan or system or as to tend to show the existence of such a plan or system. Thus, when one's motive, malice, or ill will or his intention or good or bad faith in doing or omitting to do certain acts becomes an issue, his acts, statements, and conduct on other occasions which have a bearing upon his motive or intention upon the occasion in question are competent evidence. Where several forgeries were a part of the same transaction and tend to show a common plan or scheme, evidence of other forgeries or alterations is admissible upon an issue of forgery or alteration in a civil case. Where fraud is an issue, evidence of other similar frauds perpetrated by the same person on or about the same time, is admissible particularly where the acts are all part of one general scheme or plan to defraud."

In States v. Riss & Co., Inc., 139 W. Va. 1, 80 S.E.2d 9, it is said that,

"In an action to recover the value of a cargo allegedly destroyed by fire following an accident, evidence of other accidents involving similar cargo, in which the cargo was allegedly destroyed by fire, which accidents occurred closely in point of time with the accident in question, is admissible under the defense of fraud to show a general plan or scheme or intent to defraud."

In the case of Shingleton Bros. v. Lasure, 122 W. Va. 1, 6 S.E.2d 252, Syl. 1, it is stated,

"In a civil case there may be proof of acts other than the one involved if they be so related in character, time and circumstances as to tend to establish a plan or system inclusive of the act in suit."

In the case of First National Bank of Pennsboro v. Barker, 75 W. Va. 244, 83 S.E. 898, Syl. 4 reads as follows.

"To prove, in a civil action, the perpetration of a criminal or fraudulent act by any person, evidence of

other similar acts done by him, conduct on his part, importing the same and his admissions thereof are admissible, provided they are so connected in time, purpose and character as to indicate a scheme, plan or design on his part, broad enough to include the act in question."

In the case of Piedmont Bank v. Hatcher, 94 Va. 229, 26 S.E. 505, the Court held that where fraud in the sale of property is an issue, evidence of other frauds of like character, committed by the same party, at or about the same time is admissible. The Court held that *large latitude is always given to the admission of evidence where the charge is fraud.*

In the case of Miles F. Bixler Company v. Dunsmore, 109 W. Va. 727, 156 S.E. 72, the Court held that evidence of an agent's fraud, in procuring a similar order, was admissible to corroborate defendant's testimony as to fraud.

In the case af Baldwin v. Warwick (C.C.A. 9th Cir), 213 F.2d 485, Syl. 3 reads as follows:

"In action by real estate dealer for damages on ground that defendants, pursuant to conspiracy between them, had defrauded dealer by trick and device inducing amnesia in him by means of drugged drinks with result that he had sustained gambling losses, testimony of other real estate men showing similar experiences they had had with defendants was admissible for limited purpose of showing existence of overall scheme on defendants' part."

In the case of Osborne v. Holt and Woodson, 92 W. Va. 410, Syl. 1, 114 S.E. 801 reads as follows:

"Evidence of similar representations, made to others, by one soliciting subscriptions to the capital stock of a corporation, to induce purchases of such property, are admissible in a suit for damages by one who purchases stock on the faith of fraudulent representations, not as evidence of the statements made to the plaintiff in such suit, *but as showing the inclination of mind*

of the party charged with making the representations on the subject."

In the case of Wilson v. Carpenter's Administrator, 91 Va. 183, 21 S.E. 243, a suit to cancel a contract on account of false representations by an agent, the Court held that evidence of similar statements made by the agent to other people at other times, though not competent to prove what occurred when the contract in question was made, might be "introduced to show the bent of the agent's mind."

Thus, the evidence offered by Culbertson, tending to show the practicing of fraud and deceit by McCall against Pine Oaks, in a similar transaction, over a similar period of time, and in the same general area, though not competent to prove the misconduct charged by Culbertson in the instant case, nevertheless is admissible for the purpose of showing "the bent of the agent's [McCall's] mind," or as said by the Court in the case of Osborne v. Holt, supra, for the purpose of "showing the inclination of mind" of McCall, the agent.

The Issues Involved

From the foregoing statements of facts and analysis of the evidence, it may be observed that the controlling issues in this case are:

1. What was the nature of the agreement dated June 20, 1947, under which McCall, as Clyborne's assignee, undertook to sell Whitewood's coal?

2. Was the agreement of June 20, 1947, modified as of February 1, 1949, as contended by defendants, or did the agreement continue in effect during the entire period in controversy?

3. If the agreement of June 20, 1947 was not modified, but continued in effect, is the claim of Franks and Culbertson now barred by the five or ten year Statute of Limitations?

These questions will be discussed in the order stated.

A. What Was the Nature of the Agreement Dated June 20, 1947, Under Which McCall, as Clyborne's Assignee, Undertook to Sell Whitewood's Coal?

This question has been briefed by counsel for plaintiffs and defendants. Counsel for plaintiffs assert that under the agreement dated June 20, 1947, McCall, as Clyborne's assignee, was Whitewood's exclusive sales agent. However, counsel for defendants, although conceding that under the agreement McCall acted in a fiduciary capacity, deny that McCall was a sales agent for Whitewood, exclusive or otherwise. Defendants say that under the agreement McCall was an "exclusive distributor," and as such exclusive distributor was the *purchaser* of Whitewood's coal, Tr. 28-30, 166-8; that, as such purchaser, McCall took title to the coal at Whitewood's tipple and was responsible to Whitewood for the sales price of the coal, less commissions, even though McCall did not collect for the coal; and, furthermore, that McCall's books and records, during the entire period July 1948 through December 1955 indicated that McCall was a *purchaser* of Whitewood's coal, Tr. 28-30, 34.

It does not seem too important at this time to determine whether, under the agreement of June 20, 1947, McCall was Whitewood's sales agent, or whether it was an "exclusive distributor" as that term is used by defendants. It is conceded by defendants, and is quite clear, that McCall acted in a fiduciary capacity under the agreement and unless the agreement was modified in January 1949, as contended by defendants, McCall continued to act in a fiduciary capacity which required it to exercise the utmost good faith in its dealings with Whitewood and to account to Whitewood for the sales prices of Whitewood's coal, less the agreed selling commissions. However, the agreement itself, and other relevant evidence, would indicate that McCall was in fact Whitewood's sales agent, and that this agency relationship was well understood by the parties to the agreement.

The agreement dated June 20, 1947, at one point refers to Clyborne as "distributor or sales agent," and the agreement repeatedly refers to Clyborne's "sales commission."

The agreement was prepared by counsel for defendants and will be construed most strongly against defendants.

Clyborne's letter, dated January 28, 1949, addressed to Whitewood — plaintiffs' Exhibit No. 28 — said, "* * * It is agreeable with me for us to mutually disregard the *agency clause* of the contract * * *."

Defendants' Answer — paragraph V, subtitle B, page 3 — says, "Effective February 1, 1949, by mutual agreement, the agency portion of said exclusive distributorship agreement was terminated."

McCall entered into several contracts with General Services Administration for the sale of Whitewood's coal. Two of these contracts, covering the shipment of coal from July 1, 1950 to June 30, 1952, referred to McCall as Whitewood's "exclusive sales agent." In other contracts with General Services Administration, McCall was referred to as "distributor."

Defendants filed a pleading herein entitled EXCEPTION TO MOTION FOR PRODUCTION OF RECORDS AND DOCUMENTS UNDER RULE 34 OF THE FEDERAL RULES OF CIVIL PROCEDURE. We quote paragraph 2 of this pleading in its entirety:

> "2. As appears from the Answer of the Defendants and particularly from sub-paragraph B of Paragraph V thereof, *the Defendants have admitted that such agency existed in respect of coal shipped from June, 1947 through January, 1949 and have alleged that effective February 1, 1949 such agency was terminated by mutual agreement* and that thereafter the Defendant, Jno. McCall Coal Company, Inc., purchased the coal at prices agreed upon from time to time, which prices were paid by the Defendant to the said Plaintiff and J. H. Franks in the ordinary course of business."

Furthermore, plaintiffs' Exhibits Nos. 2 and 3, being copies of letters from Carl C. Gillespie, one of defendants' attorneys, to H. Claude Pobst, repeatedly refers to the termination of the "sales agency" provisions of the agreement of June 20, 1947.

The fact that all of Whitewood's coal was consigned to McCall at either Bluefield, Roanoke or Portsmouth scales, and the fact, if it be a fact, that McCall took title to the coal at Whitewood's tipple, is insufficient to overcome the provisions of the agreement itself, the construction placed upon the agreement by the parties themselves, and the other evidence to the effect that the agreement created an agency relationship. The further fact, if it be a fact, that McCall guaranteed to collect the sales price of the coal does not affect the agency relationship. However, there is no evidence that this situation ever arose or was discussed.

It seems to be well established that a principal can transfer legal title to an agent so that the agent can deal more freely with the subject matter of the agency, and there may be an agency with a guarantee by the agent that sales will be made and that the purchaser will pay. This places the risk upon the agent to the same extent as if he were the purchaser. See Restatement — Agency 2d, Section 14J, Comment b(1)(2). The ultimate distinction between a buyer and an agent is that between a fiduciary and a non-fiduciary. Restatement — Agency 2d, Section 14J, Comment a.

The case of Sallisbury v. Brooks, 81 W. Va. 233, 94 S.E. 117, seems to be in point. In that case, the Court held that the contract created an agency to sell, despite language therein which indicated a contract of purchase and sale. Also see Sperry v. Premier Pocahontas Colleries Company, 87 W. Va. 223, 104 S.E. 486.

Therefore, it appears that McCall was a sales agent for Whitewood under the agreement dated June 20, 1947.

B. Was the Agreement of June 20, 1947 Modified as of February 1, 1949, as Contended by Defendants, or Did the Agreement Continue in Effect During the Entire Period in Controversy?

The law seems to be well settled that once the relationship of principal and agent has been clearly established, an agent, claiming a change in that relationship to that of buyer and

seller, must prove by clear and convincing evidence that the minds of the parties definitely met on the alteration. Smokeless Fuel Company v. Western United Corporation (C.C.A. 4th Cir.), 19 F.2d 834, 835; Bischoff v. Francesa, 133 W. Va. 474, 56 S.E.2d 865; State ex rel. Coral Pools, Inc. v. Knapp, 147 W. Va. 704, 131 S.E.2d 81. Therefore, the question now before the Court is whether defendants have proved by clear and convincing evidence that the minds of the parties met on the alleged termination of the sales agency relationship.

The evidence bearing on this question has been fully discussed and will not be repeated at length. It will not justify the Court in holding that defendants have proved by clear and convincing evidence that the minds of the parties *met* on the alleged termination of the agency relationship. To the contrary, the weight of the evidence supports Culbertson's contention that the agency relationship was not terminated during the period in controversy and the following facts, which seem to be fully established, support this conclusion:

(a) McCall, Whitewood's sales agent under the agreement, was not notified by Clyborne of the alleged change in the agreement until the latter part of 1964. Clyborne's testimony to the effect that he discussed the change in the agreement with McCall, Sr. in 1949, is entirely too vague, indefinite and uncertain to support a finding that Clyborne did discuss the alleged change in the agreement with McCall, Sr. If, in fact, the agency relationship had been terminated, it was Clyborne's duty to promptly notify McCall of the change. His failure to do so casts doubt on his testimony that there was such a change in the agreement.

(b) McCall's method of recording on its books its transactions with Whitewood, and in accounting to Whitewood, did not vary during the entire period in controversy — July 1, 1948 to December 31, 1955. This fact supports Culbertson's contention that the agency relationship was not terminated during that period.

(c) McCall's various methods of showing prices of coal on copies of orders and mine sheets sent to Whitewood sub-

sequent to February 1, 1949, was not, under the circumstances, inconsistent with an agency relationship between McCall and Whitewood. During the period February 1, 1949 to August 16, 1949, sixteen orders showed certain prices "less 8%." The 8% increase seems to have been permitted under the agreement in question, which provided that if Clyborne's costs increased to the point justifying an increase in commissions that the commissions could be increased from 20¢ per ton to 8% of the sales prices. From August 16, 1949 until September 1951, with few exceptions, only net prices were shown on the orders sent to Whitewood. However, from September 6, 1951 to December 31, 1954, with very few exceptions, the prices were shown as certain prices "less 25¢." The evidence fully supports the conclusion that effective September 3, 1951, Franks and Culbertson agreed with Clyborne that McCall's commission on all sales would be reduced from 8% of the sales price to 25¢ per ton. See plaintiffs' Exhibits Nos. 4 and 5. During 1955, only net prices were shown.

Culbertson testified, Tr. 346-7, that frequently Clyborne would call him and tell him that he had a price for so many tons of coal; that he, Culbertson, would say "all right" and would ship the coal, and when he received the check for the coal, if the check was for less than the price Clyborne had quoted on the phone, he, Culbertson, assumed that McCall had deducted its commission. Culbertson further testified that when he received orders showing only net prices, that he reconstructed the figures and ascertained McCall's commission and added it to the price shown on the order, so as to determine the gross selling price of the coal; and that, thereupon, he entered the transaction in his books, and that the books showed the commissions deducted by McCall. Whitewood's books, introduced in evidence as plaintiffs' Exhibits Nos. 19 and 20, are apparently authentic, and there is no reason to doubt that the entries therein were made at or about the time of the transactions therein recorded. These books clearly show that, prior and subsequent to February 1, 1949, Whitewood considered that McCall was selling Whitewood's coal on a commission basis and was not a purchaser of Whitewood's coal.

In this connection, it may be pointed out that during the period 1956 to 1961, McCall acted as exclusive sales agent for Pine Oaks Coal Corporation, and during that period McCall reported prices to Pine Oaks in different ways. In many instances only the net prices were reported, whereas in other instances certain prices were shown "less 6%." In two of the orders, no prices were shown and the words "will advise" followed the word "price." See testimony of C. A. Clyborne, Tr. 157-163.

Furthermore, if McCall, subsequent to February 1, 1949, acted as the *purchaser* of Whitewood's coal, it is strange that numerous orders did show certain prices less 8%, or less 25¢, and defendants' evidence offers no satisfactory explanation of this procedure. If, as Clyborne testified, the "less 8%" or "less 25¢" represented a wholesaler's discount, it was entirely unnecessary and superfluous to show a certain price less the discount. It obviously would have been much simpler to show in all cases the net purchase price payable by McCall.

(d) Clyborne's testimony that prior to January 28, 1949, he entered into an agreement with Franks and Culbertson to modify the agreement of June 20, 1947, and wrote the letter of January 28, 1949, is not corroborated by any other witness, or by any other fact or circumstance. Culbertson denied that he received the letter in question. McCall's different methods of reporting prices to Whitewood subsequent to February 1, 1949, does not support Clyborne's contention that the agreement was modified since, as has been shown, these different methods of reporting prices were not inconsistent with an agency relationship. Then, too, Clyborne was unable to produce the carbon copies of the letter alleged to have been written on January 28, 1949, although he testified that the carbon copies were valuable and were kept in his safe for many years.

(e) It is defendants' contention that Culbertson's persistent complaints concerning prices, from August 1948 to January 1949, caused the parties to agree on a modification of the agreement of June 20, 1947. Culbertson, however,

denied that he and Franks complained of prices and asserted that Whitewood received good prices for its coal during the period in question, and that Whitewood was well satisfied with the prices it received, Tr. 329. Culbertson's testimony that Whitewood received good prices for its coal during said period *is not denied by defendants*, and plaintiffs' Exhibit No. 16 indicates that the prices received by Whitewood for its coal during the period July 1, 1948 to January 1949 were very good, particularly in comparison with the prices thereafter received. During 1948, Whitewood made a profit of 95¢ per ton on its coal, which was more than twice the profit it earned in any succeeding year.

Therefore, if, during the period in question, Whitewood received good prices for its coal and was satisfied with these prices, and made no complaint, then it would be illogical that Franks and Culbertson would desire to end the agency relationship and *sell* their coal to McCall.

(f) Clyborne testified that the agreement of June 20, 1947, was modified in order to give Whitewood an opportunity to reject orders if the prices were not satisfactory to Whitewood. However, the evidence shows clearly that Whitewood never, at any time, rejected an order or refused to ship the coal called for in the order. Therefore, if the right to reject orders if the prices were not satisfactory to Whitewood was the reason for the alleged modification of the agreement of June 20, 1947, it is indeed strange that Whitewood never once took advantage of the opportunity and rejected an order. Whitewood's failure to reject a single order during the entire period July 1, 1948 to December 31, 1955, tends to refute defendants' contention that the parties agreed upon the alleged modification of the agreement.

C. If the Agreement of June 20, 1947 Was Not Modified, But Continued in Effect, Is the Claim of Franks and Culbertson Now Barred by the Five or Ten Year Statute of Limitations?

Defendants contend that Chapter 55, Article 2, Section 6 of the West Virginia Code — the 5 or 10 year Statute of

Limitations — is applicable to plaintiffs' claim; that defendants have not obstructed the prosecution of plaintiffs' claim and that, therefore, Chapter 55, Article 2, Section 17 of the West Virginia Code, which tolls the Statute of Limitations, when a defendant has obstructed the prosecution of the right, is not applicable to this case.

Plaintiff Culbertson contends that defendants did obstruct the prosecution of his claim by deliberately misrepresenting to Whitewood, over a period of years, the prices received by McCall for Whitewood's coal, and consistently underpaid Whitewood for its coal.

Thus, the question now before the Court is whether defendants did obstruct the prosecution of plaintiffs' claim within the meaning of Chapter 55, Article 2, Section 17 of the West Virginia Code.

Defendants say that if the agreement of June 20, 1947 did create an agency relationship and if that agreement was never modified as contended by defendants, there was, nevertheless, on February 1, 1949, "* * * a sudden change and the orders which Whitewood received began to show a flat price instead of a price less 20¢ per ton or less 8%. There was no correspondence or conversation or other communication as to why this sudden change occurred, but nevertheless Culbertson did not make any inquiry whatsoever of McCall or Clyborne notwithstanding that there were frequent telephone conversations between Culbertson and Clyborne." Defendants' brief, page 9. Defendants further say that "* * * such a radical unexplained change put Culbertson under a duty to make inquiry and to request an accounting as to the prices which were actually being received by McCall." Defendants further say that the tolling statute, Chapter 55, Article 2, Section 17, as construed by the West Virginia Supreme Court, requires that there be "some affirmative act by the defendant to conceal the existence of liability," but that there was no such affirmative act committed by defendants (page 8 of defendants' brief). And finally, defendants say that if the agreement of June 20, 1947 created an agency relationship, then Culbertson's right to an audit

of McCall's books and an accounting was automatic, and that this right should have been pursued.

On the other hand, Culbertson testified that he had no reason to suspect that McCall was not correctly reporting the prices received by McCall for Whitewood's coal. He testified that it never occurred to him to ask Clyborne why some of the orders merely showed flat prices, whereas other orders showed certain prices less 20¢, less 8%, or less 25¢, Tr. 342. Culbertson said, "I just figured he done took his commission out at that particular time," Tr. 342.

Culbertson further testified, Tr. 346-7, that frequently he would talk on the phone with Clyborne and that Clyborne would advise him as to prices which McCall could obtain for Whitewood's coal; that Whitewood would then ship the coal and if, when he received a check for the coal the price was less than the price quoted by Clyborne, he, Culbertson, would assume that McCall had deducted its commission.

Strongly corroborating Culbertson's testimony that he was always under the impression that McCall was accounting to Whitewood for the proceeds of sales, less selling commissions, are the entries made, at the time, by Culbertson, in Whitewood's books — plaintiffs' Exhibits Nos. 19 and 20.

The law is well settled that the burden rests upon defendants, under their plea of the Statute of Limitations, to establish by a preponderance of the evidence that the claim of plaintiffs is barred by the Statute of Limitations. Preston County Coke Company v. Preston County Light and Power Company, 146 W. Va. 231, 119 S.E.2d 420.

In considering whether Franks and Culbertson, in the exercise of reasonable diligence, should have discovered that McCall was misrepresenting to them the prices received by McCall for Whitewood's coal and underpaying Whitewood, the relationship between McCall and Whitewood must be considered, since the law governing such a fiduciary relationship is quite different from the law governing the relationship between parties who are dealing at arms length.

> "A number of decisions have laid down the rule that failure to employ the necessary means to discover the

fraud may be excused when plaintiff was lulled into a sense of security *by reason of a relation of trust and confidence between himself and defendant, rendering it the duty of defendant to disclose the truth*, and when it also appears that because of this confidence plaintiff was actually deterred from sooner discovering the fraud. or even suspecting that any fraud had been perpetrated on him; in such a case, it has been held, plaintiff is under no duty to make inquiry until something occurs to excite his suspicions, and this rule applies until the influence of the confidential relation has ceased. A fortiori plaintiff is not debarred of relief where he made reasonable efforts to learn the truth, but without avail. It has been held that, where an agent commits a fraud on his principal, his mere silence in failing to disclose the facts amounts to a continuation of the original fraud and a concealment of the cause of action, so that the running of the statute is postponed according to the general equitable or statutory rule. Other decisions, however, require the exercise of diligence notwithstanding the existence of confidential relations or the relation of principal and factor." 54 C.J.S. (Limitations of Actions), § 194, pages 198-199.

"Where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. In such a case, so long as the relationship continues unrepudiated, there is nothing to put the injured party on inquiry, and he cannot be said to have failed to use due diligence in detecting the fraud. * * * Similarly, an agent, sued for fraud, cannot set up that the principal should have suspected him." 34 Am. Jur., (Limitation of Actions), Sec. 168, page 135.

"* * * However, it is generally held that 'The failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties.' 54 C.J.S., Limitations of Actions, § 194, p. 198. This is so for the reason that a confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the

utmost of good faith and to disclose all material facts affecting the relation. Also, a confidential relation by its very nature presupposes that the confiding party, in deference to the confidence and trust reposed in the other party, may in a measure relax his faculties of vigilance and act upon the assumption, until notice to the contrary, that the person in whom confidence is reposed will disclose, in the honest performance of his duty, all of the essential facts connected with the relation and take no unfair advantage. Accordingly, it is generally held that when it appears that by reason of the confidence reposed the confiding party is actually deterred from sooner suspecting or discovering the fraud, he 'is under no duty to make inquiry until something occurs to excite his suspicions.'" Vail v. Vail, 233 N.C. 109, 63 S.E.2d 202, 207-208.

"A failure to use such diligence as is ordinarily required of two persons transacting business with each other may be excused when there exists such a relation of trust and confidence between the parties that it is the duty, on the part of the one who committed the fraud and thereby induced the other to refrain from inquiry, to disclose to the other the truth." Bennett v. Anson Bank and Trust Company, 265 N.C. 148, 143 S.E.2d 312, 318.

In the case of Sun Building and Loan Association of Newark v. Rashkes, 119 N.J. Eq. 443, 183 A. 274, the Court said that equity should afford relief and "not permit the statute of limitations to give aid and comfort to a transgressor by barring relief to a victimized client who has exercised due diligence."

Defendants, in support of their contention that they have not obstructed plaintiffs' right of action, apparently rely principally on two West Virginia cases: Boyd v. Beebee, 64 W. Va. 216, 63 S.E. 304, 17 L.R.R.A., N.S., 660, and Teter v. Moore, 80 W. Va. 443, 93 S.E. 342. However, as pointed out in Culbertson's brief in support of his position that the Statute of Limitations does not bar this action, neither of these cases support defendants' contention. To

the contrary, Teter v. Moore, supra, strongly supports the plaintiffs' position. Boyd v. Beebee, supra, is not in point on the facts. Both cases recognize the principle that when a defendant, particularly one acting in a fiduciary capacity, commits an act which naturally conceals itself, proof of such fact makes out a case of obstruction under the statute. In Cameron v. Cameron, 111 W. Va. 375, 162 S.E. 173, the Court, at pages 380-1, said,

> "Furthermore, in cases like this, where confidential relations exist between the parties and the basis of the action is actual fraud, many courts hold that mere silence on the part of the guilty party will toll the running of the statute. It has been stated many times that, if the basis of the action is actual fraud, mere silence is regarded as a continuation of the original fraud, and as constituting fraudulent concealment * * *; and this would seem to be especially applicable to cases where the parties bear to each other a trust or confidential relation."

The evidence in this case indicates clearly that Franks and Culbertson had the utmost confidence in Clyborne and McCall. They accepted all orders sent to them by McCall and, without question, shipped the coal, although in most cases they did not know the names of the purchasers or the final destination of the coal. Franks and Culbertson never rejected an order or refused to ship. They accepted the monthly settlement checks sent to them by McCall without question and never requested permission to examine McCall's books. It would be difficult to imagine a case in which a principal reposed more confidence in his agent than the confidence and trust reposed by Franks and Culbertson in McCall.

Under the circumstances, the Court would not be justified in holding that Whitewood's acceptance of orders showing flat prices without any deductions was sufficient to charge Whitewood with knowledge that McCall was deceiving Whitewood. If McCall intended to terminate the agency relationship and *purchase* Whitewood's coal, at prices agreed on from time to time, it should have so advised Whitewood in no uncertain terms. It was McCall's duty to speak and speak

loud and clear. The burden was on McCall to make its position known; not on Whitewood to take measures to detect the fraud. However, McCall did not make its position known, but continued to send orders to Whitewood, some of which showed flat prices and others of which showed certain prices less 8% or less 25¢. Such conduct was a concealment of plaintiffs' right of action, and was a continuation of the fraud.

Therefore, defendants should not be permitted to escape liability for their conduct by simply showing flat prices in some of the orders sent to Whitewood and then, when the fraud has been detected, to take the position that Whitewood should have discovered the fraud during the time it was being perpetrated.

Findings of Fact

The Court makes the following findings of fact:

1. The written agreement dated June 20, 1947, under which McCall, as Clyborne's assignee, obtained Whitewood's coal, was not changed or modified as of February 1, 1949, as testified by C. A. Clyborne, but to the contrary, said agreement continued in full force and effect during the entire period June 20, 1947 to December 31, 1955, except that the agreement pertaining to McCall's selling commissions was modified as hereinafter shown.

2. During the period July 1, 1948 to December 31, 1955, pursuant to the terms and provisions of said lease and agreement dated June 20, 1947, as later modified with respect to commissions paid to McCall, Whitewood shipped and delivered to McCall 245,011.35 tons of coal, which McCall sold or otherwise disposed of.

3. During the period July 1, 1948 to September 23, 1948, pursuant to said lease and agreement dated June 20, 1947, McCall was entitled to receive for its services in selling Whitewood's coal 20¢ per net ton. During the period September 23, 1948 to September 3, 1951, pursuant to said lease and agreement dated June 20, 1947, McCall was entitled to receive for its services in selling Whitewood's coal a

commission of 8% of the selling price. During the period September 3, 1951 to December 31, 1955, pursuant to an oral agreement between Franks and Culbertson and McCall, later confirmed by correspondence — plaintiffs' Exhibits Nos. 4 and 5 — McCall was entitled to receive for its services in selling Whitewood's coal a commission of 25¢ per net ton.

4. During the entire period July 1, 1948 to December 31, 1955, Franks and Culbertson believed, and were justified in believing, that McCall was paying to Whitewood for its coal the sales prices received by McCall for said coal, less the commissions to which McCall was entitled under the written agreement dated June 20, 1947, as modified by the agreement effective September 3, 1951.

5. During the period July 1, 1948 to December 31, 1955, neither Franks nor Culbertson had reasonable cause or grounds to believe, or suspect, that McCall was not accounting to Whitewood for the proceeds of sale of Whitewood's coal, by McCall, less McCall's agreed selling commissions.

6. During the period July 1, 1948 to December 31, 1955, McCall did not pay to Whitewood the full proceeds of sales of Whitewood's coal, less McCall's agreed selling commissions. To the contrary, with the possible exception of some three to five cars of coal, McCall sold all of the coal obtained by it from Whitewood, at prices in excess of the prices paid by McCall to Whitewood. Tr. 112-13, 142. During the entire period July 1, 1948 to December 31, 1955, McCall, through the copies of orders and mine sheets furnished by McCall to Whitewood, consistently concealed from Whitewood the prices received by McCall for Whitewood's coal.

7. Neither Franks nor Culbertson knew, or had reasonable cause to believe, until the latter part of 1963, that McCall, during the period July 1, 1948 to December 31, 1955, had misrepresented to Whitewood, or was concealing from Whitewood, the prices obtained by McCall for Whitewood's coal, or that during said period McCall had underpaid Whitewood for its coal.

In reaching these findings of fact, the Court has disregared plaintiffs' Exhibit No. 24 (copy of letter from the General Services Administration to W. Pat Jennings and attached memorandum) for the reason that the Court believes such exhibit is inadmissible and defendants' objection thereto is accordingly hereby sustained. The Court, however, has considered the evidence of Jack Persinger, Tr. 225-60, and plaintiffs' Exhibit No. 18 (copy of U. S. Bureau of Labor Statistics Cost of Living Index, et cetera) and defendants' objection thereto is hereby overruled.

Conclusions of Law

Upon the basis of the foregoing findings of fact, the Court draws the following conclusions of law:

1. Pursuant to the terms of the written lease and agreement dated June 20, 1947 (plaintiffs' Exhibit No. 1) McCall, as Clyborne's assignee, became the exclusive sales agent for the sale of all coal mined and produced by Whitewood from the lands described in said lease.

2. During the period of July 1, 1948 to December 31, 1955, defendants, by reason of their conduct in misrepresenting to Whitewood the prices received by McCall for Whitewood's coal, and in intentionally concealing the prices received for Whitewood's coal, obstructed Franks' and Culbertson's right of action against defendants, within the meaning and intent of Chapter 55, Article 2, Section 17 of the West Virginia Code, and such obstruction continued up to the time of the institution of this action and now continues. Therefore, the West Virginia Statute of Limitation, Chapter 55, Article 2, Section 6, does not bar Franks' and Culbertson's right of action against defendants.

3. Franks and Culbertson have the right to make such examination and audit of McCall's books and records as will disclose the prices received by McCall for Whitewood's coal during the period July 1, 1948 to December 31, 1955, and to examine and audit such other books and records in McCall's possession, or under its control, as are relevant and material to such inquiry. Accordingly, Culbertson's

Motion for production of records and documents under Rule 34 is granted.

Let judgment be entered accordingly.

REPORT OF W. T. HANCOCK, SPECIAL MASTER

To The Honorable Sidney L. Christie,
Judge of Said Court:

The undersigned, W. T. Hancock, to whom this cause was referred as Special Master by order entered herein on July 23, 1968, having proceeded pursuant to said order and per agreement of the parties with the taking of evidence offered by them on December 16, 17 and 18, 1968, March 17, 18 and 19, 1969, October 26 and 27, 1970, and January 14, 1971; having heard the argument of counsel as to various matters on March 11, 1969, June 19, 1970, and September 1, 1970; having considered and received in evidence the deposition of Charles A. Appel, Jr., taken at Washington, D.C. on June 24, 1970; having considered and having sustained the objection of defendants to the admission in evidence of the depositions of Lewis E. Spangler, Jr. and Margaret V. Nester taken at Alexandria, Virginia on June 24, 1970; and having considered all arguments, memoranda and briefs submitted by counsel herein; tenders now unto your Honor this his report, and files herewith a complete transcript of the aforesaid proceedings accompanied by all of the Exhibits offered in evidence by the parties and all of the memoranda and briefs submitted by counsel.

As of possible assistance in following his presentation, the Special Master lists the following "dramatis personae" in the order of their appearance herein:

McCall — the defendant Jno. McCall Coal Company, Inc.

Whitewood — Whitewood Smokeless Coal Company, a partnership composed of William M. Culbertson, Jr., and J. H. Franks.

Persinger - Jack Persinger, CPA, plaintiff's accounting witness.

Jones — B. F. Jones, CPA, plaintiff's accounting witness.

Cook — Vernon Cook, CPA, defendants' accounting witness.

Perkinson — R. E. Perkinson, Secretary of the defendant, Clyborne, Inc., and "Trustee" to whom coal royalties were paid by Whitewood.

Clyborne — the defendant, C. A. Clyborne.

Culbertson — the plaintiff, William M. Culbertson, Jr.

Childs — Richard F. Childs, CPA, Secretary and Assistant Treasurer of the defendant, Jno. McCall Coal Company, Inc. and its chief accounting officer.

American Southern — American Southern Export Company, a corporation.

Post — Edward H. Post, President of American Southern Export Company.

McCall, Sr. — John McCall, Sr., deceased, former President of Jno. McCall Coal Company, Inc.

McCall, Jr. — John McCall, Jr., President of Jno. McCall Coal Company, Inc.

Franks — J. H. Franks, deceased, a member of the Whitewood Smokeless Coal Company partnership.

References to Transcripts and Exhibits have to do with proceedings before the Special Master except in those instances where the expressions "Court Transcript" and "Court Exhibit" are used to indicate the proceedings had before the Court prior to the order of reference.

The Court's opinion of September 28, 1967, 275 F. Supp. 662, states the basic facts as to the relationship between the parties and the methods by which they transacted their mutual business. Accordingly, no repetition thereof seems necessary or desirable at this point, especially since there is nothing in the evidence introduced subsequent to the court hearing which warrants any change in the Court's statement.

As prerequisite to its finding that the plaintiff was entitled to an accounting, so as to justify the granting of his motion for the production of records and documents, the Court determined, first, that McCall was a sales agent for Whitewood under the agreement of June 20, 1947, which agreement, though modified in some respects, continued in effect throughout the entire period in controversy as an agency agreement, and second, that defendants obstructed the prosecution of plaintiff's claim by misrepresenting the prices received by McCall for Whitewood's coal, so as to toll the running of the statute of limitations in defendants' favor.

Considerable evidence was introduced before the Court on the agency relationship, the purported cancellation thereof if it did in fact originally exist, and the misrepresentation of prices. Much of this evidence was reintroduced and all of it was reiterated and in some instances enlarged upon before the Special Master. The defendants in effect have insisted throughout that all the Court did by its opinion of September 28, 1967 and the order subsequently entered thereon, was to grant unto plaintiff the right to examine defendants' books and records, with nothing else really decided. They contend that the relationship between the parties changed at February 1, 1949, as evidenced by "drastic changes in manner of stating the

prices on the orders which McCall Coal sent to Whitewood and in the relationship between those prices and the prices which were received by McCall Coal" (Brief, p. 12), and that if "there was a 'concealment' by the Defendants of the prices which McCall Coal was receiving [the plaintiff] should have, in due diligence, discovered the existence of this concealment more than five years before he filed suit" (Brief, p. 13).

The Court was fully aware of the change in method of stating prices on the orders. Plaintiff's Court Exhibit 16, considered and discussed at length in the Court's opinion of September 28, 1967 at pp. 10-13, while different from defendants' Exhibit 24 in form and manner of presentation, gives a pricing picture substantially similar to the picture shown by defendants' Exhibit 24 as introduced before the Special Master; and plaintiff's reaction to those different methods of pricing was fully considered by the Court. Moreover, on evidence not materially different from that presented before the Special Master, the Court found that the defendants did obstruct the prosecution of plaintiff's claim and that nothing occurred to charge plaintiff with knowledge that he was being deceived.

By its order of April 24, 1970, the Court instructed the Special Master that "its opinion and its Findings of Fact and Conclusions of Law, dated and filed September 28, 1967, and the subsequent orders entered in connection therewith, shall not be considered binding upon the Special Master except as to the issues and to the extent the same would be binding upon the Court had the reference not been made." But the Special Master finds nothing in the evidence as presented before him that would, in his opinion, have caused the Court to alter such findings of fact and conclusions of law and the subsequent orders entered in connection therewith, except as to the total tonnage shipped to defendants, set forth as 245,011.35 tons in Finding of Fact No. 2, and as to the number of instances in which McCall paid Whitewood the correct amount for its coal, set forth as some three to five cars of coal in Finding of Fact No. 6.

As to the total tonnage shipped, for whatever that figure may be worth, the witness Persinger, by his testimony and plaintiff's Exhibit 20 which he prepared, fixed it at 246,199.80 tons. The witness Jones, by plaintiff's Exhibit 19 which he prepared, showed that the tonnage on shipments (exclusive of those to the ships Baylor Victory and Yankee Fighter) as to which McCall underpaid Whitewood (per the Court's Finding of Fact No. 3 as related to the actual selling prices disclosed to him by McCall's books) was 133,505.15 tons; and he testified (Tr. 324) that on 106,551.10 tons proper payment or overpayment was made. Thus, Jones established a tonnage of 240,056.25 tons, exclusive of the coal loaded in the ships Baylor Victory and Yankee Fighter. Plaintiff's Exhibits 2, 3, 4 and 5 fixed the Baylor Victory and Yankee Fighter tonnage as being respectively 2,653.25 tons and 3,304.60 tons; and this, added to Jones's figure of 240,056.25, makes a total of 246,014.10 tons. The witness Cook, by defendants' Exhibit 24 which he prepared, fixed the total tonnage at 239,946.55 tons, exclusive of the coal loaded in the ships Baylor Victory and Yankee Fighter, and adding to that figure the tonnage of the two ships you get a total of 245,-904.40 tons. All of these differences are nominal, and the three named witnesses are all certified public accountants. The Special Master considers Jones as being the most objective and the least partisan of the three and therefore finds that the total tonnage shipped by Whitewood to McCall during the period in controversy was 246,014.10 tons.

As to the instances in which McCall paid Whitewood the correct amount for its coal, Jones, having testified and having shown on plaintiff's Exhibit 19 that there were 1,050 orders on which excessive commissions (based upon the Court's Finding of Fact No. 3) were taken resulting in underpayment to Whitewood, testified further that he found 630 orders on which no underpayment was made and 60 orders on which Whitewood was overpaid, the total tonnage involved in those 690 orders being 106,551.10 tons (Tr. 324). This of course exceeds the "some three to five cars of coal" mentioned in Finding of Fact No. 6.

The Court's Finding of Fact No. 6 correctly states that "During the period July 1, 1948 to December 31, 1955, McCall did not pay to Whitewood the full proceeds of sales of Whitewood's coal, less McCall's agreed selling commissions," that being the entire period in question. However, it should perhaps be noted that the evidence introduced before the Special Master clearly shows that during the period July 1, 1948 to and including January 31, 1949, McCall did pay in every instance the full proceeds of sales less the agreed selling commissions (Tr. 317); and between the latter date and December 31, 1955 numerous sales occurred on which payment of the full proceeds less proper commission was made, there being in the neighborhood of 600 such instances (Tr. 296, 317).

The Special Master considers that he is bound by the Court's findings of fact, as modified by the foregoing, because he believes that, as so modified, the Court's findings of fact would still require the Court to arrive at the same conclusions of law which the Court set forth in its opinion of September 28, 1967. Therefore, except as to the purchased coal hereinafter discussed, the Special Master considers himself bound by those conclusions of law, namely, that McCall acted toward Whitewood as a sales agent in a fiduciary relationship, and that by misrepresenting and intentionally concealing the prices received for Whitewood's coal, McCall obstructed plaintiff's right of action so that his claim is not barred by the West Virginia statute of limitations.

The Various Coals

The new issue that came before the Special Master had to do with coal which was shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955, but which was not mined from the leasehold and was therefore not specifically covered by the agreement of June 20, 1947. This coal, taken other than from the leasehold, will herein frequently be referred to as the "outside coal". Such coal, incidentally, was a part of the total tonnage of 246,014.10 tons (245,011.35 tons as found by the Court), discussed above. This issue made

its appearance during the hearings before the Court, and the order of July 23, 1968, which covered the filing of plaintiff's Second Amended and Supplemental Complaint dealing with this coal, recited that certain evidence had already been adduced touching upon the items constituting the subject matter of the Second Amended and Supplemental Complaint. The order of July 23, 1968 then proceeded to refer the entire cause to the Special Master and directed him in ascertaining the various amounts, if any, owing, to take into consideration all of the coal mined and produced on the leasehold and shipped to McCall, and all of the coal mined on property other than the leasehold and purchased and shipped to McCall.

The Second Amended and Supplemental Complaint alleges that during the period here in question Whitewood, with the knowledge, consent and approval of defendants, purchased a substantial tonnage of coal not mined on the leasehold and shipped same to McCall with the understanding that McCall would account to Whitewood for the proceeds of its sale in the same manner, on the same basis, and for the same sales commissions, as was required for the coal mined from the leasehold and shipped to McCall; and plaintiff sought the same relief as to all of the coal, whether mined from the leasehold and shipped or purchased and shipped.

At an early stage in the proceedings before the Special Master it became apparent that plaintiff could not separate the leasehold shipments from the shipments of outside coal and prove separately the shipments of each.

Defendants' position has been that their contention that McCall, after February 1, 1949, was purchasing the leasehold coal from Whitewood at prices agreed upon from time to time and therefore was not accountable as a sales agent, applies more strongly, even conclusively, as to all of the outside coal, and that unquestionably the statute of limitations bars plaintiff's claim for the outside coal. They further contend that if the leasehold coal and the outside coal cannot be separated for accounting purposes, plaintiff's entire case must fall.

It thus becomes necessary to determine whether or not the relationship of the parties as to outside coal differed from their relationship, as found by the Court, in regard to the coal taken and shipped from the leasehold. The Special Master finds that it did not.

The evidence clearly shows that defendants had every reason to know McCall was receiving outside coal from Whitewood in addition to the leasehold coal. The royalty reports filed with the Trustee, Perkinson, to whom royalty payments for the leasehold coal were made by Whitewood, would have disclosed that fact to Clyborne. He knew or should have known in what quantities Whitewood was shipping to McCall, and as the owner and recipient of a share in the royalties he knew or should have known the quantities of leasehold coal on which royalties were reported and paid by Whitewood. The difference would have been quite apparent from only a casual examination. Perkinson also, an officer of Cylborne, Inc., knew or should have known both of these things. (Tr. 147, 148, 171-172, 246-248).

The evidence further shows that Clyborne did in fact know McCall was receiving outside coal from Whitewood; and that he had no objection to such shipments by Whitewood, at least so long as the coal was of a quality comparable to the leasehold coal. (Tr. 160-162, 164, 166, 200-205, 232-233, 238-241). Plaintiff's Exhibits 21, 22, 23, 40, 41, 42, 43 and 44 show that Perkinson knew it, and it is a fair inference, from those Exhibits, that Clyborne also knew it. See also Defendants' Exhibit 11, Clyborne's letter of February 14, 1951 to Culbertson. Furthermore, Clyborne had an inspector who visited and observed Whitewood's operation on a fairly regular basis, reporting to Clyborne (Tr. 218-219, 241-242). And the record does not show that McCall ever rejected or refused to sell one single car of any coal shipped to it by Whitewood. Culbertson said McCall sold all of it. (Tr. 436). Complaints, yes; corrective action, none. Moreover, it appears that McCall at times was almost desperate for coal, shipping Whitewood's coal in the name of others, some 61 cars, and the coal of others in the name of Whitewood, some 22 cars. (Plaintiff's Exhibits 32, 39, 33, Tr. 1079-1083).

As to the terms on which McCall received and sold the outside coal, Clyborne refused to affirm or deny the existence of any agreement, saying only (Tr. 165) that "that hinges on what the correspondence will disclose." But no correspondence was subsequently offered or referred to. The fair assumption is that defendants' position coincides with their position as to the leasehold coal after February 1, 1949 — it was purchased by McCall at prices agreed upon from time to time, fully paid to Whitewood, wherefore, there was no duty upon McCall to account for its selling price less any agreed commissions.

Culbertson in testifying before the Court (Court Tr. 381) admitted that there was no written or verbal agreement as to the outside coal, but he assumed that "they were paying the market price of coal"; whereupon, to the question "you're just saying that you assumed they sent in an order and you put this coal on that you bought from some other place and you assume that they were agreeing to pay you the market price?", he answered "That's right"; but he then admitted they never told him that. This occurred on cross-examination during which he had stated there were "several thousand tons of coal" included in his claim that did not come off of the leasehold (outside coal). On cross-examination before the Special Master he was pressed as to the language in his Second Amended and Supplemental Complaint about shipping outside coal with the "understanding" it would be accounted for on the same basis as the other coal. (Tr. 522-525). He says he assumed that, and that they paid him the same price they paid "on the other coal", and that they never notified him to the contrary. He did concede that "There was nothing ever said about it, to my knowledge, on either side." (Tr. 543).

If, as the Special Master finds, Whitewood was shipping outside coal to McCall with McCall's knowledge and consent, then surely both parties intended that Whitewood would be paid for that coal. Had they discussed it and come to a specific understanding, there

would be no problem. It seems clear from the testimony of both Clyborne and Culbertson that this was not done. The Court has decided what the agreement was as concerns the other coal, and if they made no separate agreement about the outside coal, as to which both had knowledge, and treated on both sides their transactions as to all of the coal in the same manner, that is, making no distinction between them, it is not unreasonable to conclude that they tacitly agreed upon the same terms for both coals. Accordingly, the Special Master finds that there was an implied agreement between the parties that the same terms should apply to all of the coal shipped by Whitewood to McCall.

The defendants have insisted that the agreement of June 20, 1947 was changed at February 1, 1949, and they point, in addition to the change in method of stating prices heretofore discussed, to Whitewood's shipments of outside coal to McCall and to Whitewood's shipments of leasehold coal to others than McCall as proof of change. They say moreover that neither of the latter two things was made known to the Court and that had the Court been aware of them and of their extent, it would not have found, as it did, that the agreement remained unchanged except as to the method of computing the selling commission.

But defendants knew of the shipment of outside coal to McCall. And Culbertson told the Court that "several thousand tons" had been shipped. (Court Tr. 379-381). This was discussed at some length before the Court, and though Culbertson denied that McCall knew he was mixing and shipping to it outside coal (Court Tr. 382), it became perfectly apparent as the case was more fully developed before the Special Master that the defendants did know. "Several thousand tons" does not necessarily imply only five or six thousand; it later proved to be closer to 50,000 (Clyborne, at Tr. 233-234 put the figure at 46,310) out of a total of some 246,000 tons. None of which is to say, as do defendants, that Culbertson deliberately tried to mislead the Court.

As to Whitewood's shipment of leasehold coal to others, the ink was not dry on the agreement of June 20, 1947 when this practice began, and with the full knowledge and approval of defendants. Nearly 15,000 tons were produced from the leasehold by Whitewood and shipped before the first shipment was made to McCall in July of 1948. Clyborne asked Culbertson in October, 1950 for a monthly breakdown of production for the period July 1, 1947 to March 1, 1948 and Culbertson reported by letter such a breakdown, showing a total tonnage of 4,580 tons for the period (Plaintiff's Exhibit 9). Clyborne, at Tr. 217, put the tonnage mined from the leasehold between October, 1947 and January, 1949 and sold to others at 22,882 tons. That he knew what was going on at the time it was going on is clear from his testimony. (Tr. 149-153). Also he knew that after July, 1948 when shipments to McCall began, Whitewood shipped some leasehold coal to others. (Tr. 153-157, 230). His own memorandum, Plaintiff's Exhibit 11, shows 161 cars of leasehold coal shipped to others. It is true he insisted that much of this information was acquired after the suit was brought and defendants began checking and investigating, but his testimony and the royalty reports themselves strongly imply considerable current knowledge. Moreover, the activities of his on-the-job inspectors, heretofore referred to, point to a fuller knowledge than he was willing to disclose.

Nor can defendants be heard to say, in the light of their knowledge of the two foregoing factual situations, that they did not get full benefit of their bargain for all of the coal contained in the leasehold. The leasehold was exhausted late in 1955 and its total production was some 229,000 tons according to the royalty reports (Tr. 390), of which McCall would have been entitled to receive 206,974 tons (Plaintiff's Exhibit 20, received without objection). In addition to the 206,974 tons of leasehold coal *available* for McCall, Whitewood purchased according to that Exhibit 40,589 tons of comparable (Carey seam — the leasehold was also Carey seam) coal, making *available* for McCall some 247,000 tons of Carey coal. Clyborne said he would have been

glad to have had from Whitewood Carey seam coal from outside the leasehold, similar in quality (Tr. 164) but he denied all Carey coal was comparable. Nevertheless, he knew he was getting some outside coal, Carey and otherwise. Plaintiff's Exhibit 20 and its companion piece Plaintiff's Exhibit 36, attempt to show that McCall *got* its 206,974 tons of Carey coal. Those Exhibits are highly questionable as proof of such fact, primarily because the tonnage of outside coal, including Carey, purchased by Whitewood is arrived at by dividing the dollars Whitewood paid for *all* purchased coal by an *assumed* price of $4 per ton. But despite that and the other infirmities in Plaintiff's Exhibit 20, it does establish the *possibility* that McCall did get very nearly a total Carey tonnage equal to the tonnage available from the leasehold; in fact, the Special Master believes it to be probable that something close to that tonnage of Carey coal was received by McCall from Whitewood. But be that as it may, the mutual knowledge of the parties and their mutual acquiescence renders the point academic. It is discussed here merely that the Court may be fully apprised of it and because both sides strove valiantly and at length concerning it.

It is apparent that the modus operandi of the parties varied from the specific letter of the June 20, 1947 agreement by mutual accord and in several instances and respects; but the agreement therein contained for selling as Whitewood's agent on terms of selling price less commission, once having been established, and tacitly extended to the outside coal as well, the defendants have failed to prove, as being mutually agreed, the subsequent change which they have asserted in that regard.

The foregoing dispositions bring us at last to the accounting. Decided otherwise, no accounting would be required.

Underpayments, Exclusive of Ships Baylor Victory and Yankee Fighter

Plaintiff's Exhibit 19, prepared by Jones and based upon his examination of McCall's records, presents the

outside measure of plaintiff's basic claim, except as to the ships Baylor Victory and Yankee Fighter. Defendants' Exhibit 24, prepared by Cook, presents defendants' best effort to reduce the amount of that basic claim. Jones found underpayments totalling $50,337.24 on 1,050 different orders (Plaintiff's Exhibit 19), and overpayments totalling $1,462.96 on 60 different orders (Tr. 290, 295), a net underpayment of $48,874.28. Cook found a net underpayment of $44,958.93 after allowance for all overpayments. He did not total the overpayments but a count of them as shown on his schedule (Defendants' Exhibit 24) discloses 88, totalling $5,192.51. From this it would appear that he found total underpayments to be $50,151.44 and total overpayments to be $5,192.51, with a resulting net underpayment of $44,958.93. Thus, the underpayment difference between Jones and Cook is only $185.80, Jones's figure being the higher one by that amount, and both of them purported to be applying the Court's Finding of Fact No. 3 to *all* of the coal shipped to McCall by Whitewood and sold by McCall (except for the ships Baylor Victory and Yankee Fighter) in determining the correctness of payment to Whitewood.

These two key exhibits, Plaintiff's 19 and Defendants' 24, differ so completely in form, arrangement, and content as to be difficult of comparison. However, the fact that the difference in the conclusion of each as to total (gross) underpayments is only $185.80 and as to tonnage (exclusive of the ships) is only 109.7 tons (see discussion page 5 hereof), attests their basic accuracy. The real difference between them lies in the overpayments. Unfortunately, Jones did not list the overpayments in his exhibit, but he testified as to there being 60 of them totalling $1,462.96. (Tr. 290, 295). Cook shows 88 on his exhibit totalling $5,192.51. The difference between them here is $3,729.55, Cook's being the higher amount.

After Defendants' Exhibit 24 was introduced, Jones was recalled by plaintiff to testify that he had examined that exhibit, had compared it with Plaintiff's 19 which he prepared, had determined what the differences were, and had prepared a schedule explain-

ing the differences. (Tr. 1525-1526, Plaintiff's Exhibit 54). This testimony and schedule make it clear that the differences arose out of the following described situation.

The Court's Finding of Fact No. 3 fixed the agreed commission for the services of McCall in selling Whitewood's coal as being 8% of the selling price before September 3, 1951 and 25¢ per ton on and after that date. The language of that finding is not specific as to whether the change applied to *orders placed* on and after that date or to *shipments made* on and after that date. It is apparent that Cook in preparing Defendants' Exhibit 24 looked to the *date of the orders* in effecting the change, whereas Jones in preparing Plaintiff's Exhibit 19 looked to the *date of the shipment;* that is to say, Cook used 8% of selling price for *orders placed* before September 3, 1951, regardless of when shipment occurred, and 25¢ per ton for orders placed after that date, and Jones used 8% of selling price for *shipments made* before that date and 25¢ per ton for shipments made after that date. Certain pages of Defendants' Exhibit 24 are headed "Prices Received and Paid by Jno. McCall Coal Company, Inc. for Coal Shipped by Whitewood Smokeless Coal Company on *Mine Orders Issued Prior to* September 3, 1951" (ital. supplied), and pages 29 and 30 of that exhibit, so headed, contain entries for October, 1951 through June, 1952. Cook testified that the column headed "Date" on his exhibit represents "the date that this shipping register [McCall's] indicated for that year. Directly beneath that are the months in which the other detail was recorded." (Tr. 1263). So his dates are shipping dates, not order dates, and clearly he was applying 8% of selling price as the proper commission on many shipments after September 3, 1951. That was the conclusion Jones reached as to what Cook had done in Defendants' Exhibit 24 (Tr. 1531-1533), and Cook was not recalled to rebut that conclusion.

The Court's opinion concerning the September 3, 1951 change, after discussing the evidence bearing upon the

point, states at page 21 of the original manuscript: "Therefore, the agreement, reducing the commission * * * apparently applied to *all future shipments.*" (Italics supplied). And it is significant that the entries on page 29 and 30 of Defendants' Exhibit 24 which cover the October 1951 through June 1952 shipments "on mine orders issued prior to September 3, 1951", show with only one exception that Whitewood was paid the sale price less 25¢ per ton, with a resulting overpayment to Whitewood if the proper commission was 8% of selling price.

The Special Master agrees with the Court's conclusion that the change in commission at September 3, 1951 was intended to apply to all *shipments made* on and after that date. Jones concluded, as is shown by Plaintiff's Exhibit 54 which he prepared, that of the $5,378.31 by which Plaintiff's Exhibit 19 and Defendants' Exhibit 24 were apart, $4,110.79 was attributable to shipments made on and after September 3, 1951 to which Plaintiff's Exhibit 19 applied a commission of 25¢ per ton and Defendants' Exhibit 24 applied a commission of 8% of selling price. No evidence to the contrary was presented. The only objection by defendants to Plaintiff's Exhibit 54 was to the wording thereon "Difference — Based on miscalculation", and it was received subject to that one objection. The difference of $4,110.79 was based of course not upon a "miscalculation", but upon an interpretation of the Court's Finding of Fact No. 3 with which interpretation the Special Master does not agree. Therefore, adding to Cook's net underpayment figure of $44,958.93 this "difference" of $4,110.79, one arrives at a net underpayment to Whitewood amounting to $49,069.72 on Cook's figures as adjusted for what the Special Master deems to be the correct view of the change in applicable commissions effective at September 3, 1951.

Jones, however, did not succeed in reconciling completely Defendants' Exhibit 24, Plaintiff's Exhibit 19, and his own testimony concerning Plaintiff's Exhibit 19. He said he had found $1,462.96 of overpayments to

Whitewood reflected in McCall's records. His "analytical comparison", Plaintiff's Exhibit 54, left a difference of $1,267.52 between Plaintiff's Exhibit 19 and Defendants' Exhibit 24 after adjusting the latter for the above discussed $4,110.79 variance, which difference he attributed to overpayments "not included in Exhibit 19".

Again, crediting Jones with being the most objective of the accounting witnesses, and their differences being, as was the case on the question of total tonnage, quite minor, the Special Master finds that the net underpayment by McCall to Whitewood for coal shipped to and sold by McCall during the period from July 1, 1948 to December 31, 1955, exclusive of the coal loaded in the vessels Baylor Victory and Yankee Fighter, was $48,874.28. This figure represents the total of the underpayments shown on Plaintiff's Exhibit 19, less Jones's figure of $1,462.96 for overpayments, and is $195.44 less than the adjusted Cook figure. That $195.44 is also the difference between the overpayments found by Jones and the amount of the overpayments ($1,267.52) which he shows on Plaintiff's Exhibit 54 as being not included in Plaintiff's Exhibit 19.

The Ships Baylor Victory and Yankee Fighter

The most time-consuming and the most acrimonius element in the hearings before the Special Master was the controversy over the two ships, Baylor Victory and Yankee Fighter, loaded by McCall at Lambert's Point, Virginia, in June and July, respectively, of 1949 with a mixture of coal furnished by Whitewood and others. Admittedly, one page from McCall's shipping record concerning the Yankee Fighter was missing and was never produced; and plaintiff conceived the idea that the shipping records as to both ships, produced and made available for examination (Plaintiff's Exhibits 2, 3, 4, 5, 6 and 18), were not the genuine, original records but were made up years later for use in this case — in effect, forgeries. He further questioned the cancelled checks

(Plaintiff's Exhibit 7) which McCall produced as proof of its payment of inland freight to the Norfolk and Western Railway Company as to both vessels, and McCall's deduction thereof in arriving at its net selling price for the coal dumped into them, and suggested that whatever the true applicable freight might be, it was refunded to McCall in some undisclosed manner. He also questioned the identify of the purchaser, and the deposit and re-deposit in McCall's bank account of a government check which McCall said was in payment for the coal loaded in the Yankee Fighter, and made extensive investigation regarding this latter point. The Special Master finds that plaintiff failed in his proof as to all of those things.

The McCall shipping records that were introduced relative to the two ships showed that 2,653.25 tons of Whitewood's coal were loaded in the Baylor Victory and 3,304.60 tons in the Yankee Fighter. (Plaintiff's Exhibits 2, 3, 4 and 5). Persinger's testimony (Tr. 374) as to information given him by Childs was 2,653.25 tons for the Baylor Victory and 3,304 tons for the Yankee Fighter, but presumably the latter figure was a rounded one, because adding the "pounds" on the shipping record and dividing by 2,000 one gets 3,304.60 tons. Both of the shipments were on government contract to the "District Engineer" (Tr. 40-41).

McCall's shipping record as to the Baylor Victory is complete and the witness Childs produced a copy of the selling invoice, and both showed the gross selling price as $90,292.07 (Tr. 42, 44-45, 89-90). Moreover, McCall's cash book showed receipt of a government check from District Engineer on July 21, 1949 for that amount, which Childs said would have been for the billing on the Baylor Victory (Tr. 94). The shipping record on this vessel shows inland freight as $35,891.11 (Tr. 42, 48), but the railroad's dump sheet was produced and entered as Plaintiff's Exhibit 1 and it shows an additional charge of $25.57 as penalty for underload on one Whitewood car, making a total of $35,916.68 for the freight. The Norfolk and Western Railway Company

freight bill for the Baylor Victory is in evidence as Defendants' Exhibit 1, stamped on its face by McCall "Paid June 21, 1949", and Childs produced McCall's cancelled check to the Norfolk and Western Railway Company dated June 21, 1949 for $35,916.68 (Tr. 46, 48-51, Plaintiff's Exhibit 7), which he said he was "reasonably certain" and had "no reason to doubt" paid the freight on the Baylor Victory. Also a dumping charge of $495.03 was paid to Walter C. Maher. (Tr. 47, Plaintiff's Exhibit 7). Defendants' Exhibit 26 is a computation based upon the foregoing facts, which establishes a net selling price of $4.86 received by McCall for the Baylor Victory coal, on which Whitewood was entitled to $4.47 per ton after deduction of 8% by McCall for its commission. Cook testified that at the request of Persinger he called Childs on the telephone and at that time he, Cook, from information given him by Childs, made the pencilled notations at the top of Plaintiff's Exhibit 4 which might be taken to indicate that McCall received $4.91 per ton for the Baylor Victory (Tr. 275-276). But the Special Master considers the evidence recited above, fixing the Baylor Victory net selling price at $4.86, as being more reliable than a notation growing out of a telephone conversation. Moreover, Persinger had the impression at the time that the figures Cook wrote down might represent the amount McCall paid Whitewood as to the two ships (Tr. 339-340).

The shipping records as to the Yankee Fighter are not complete in that one "right hand" page therefrom is missing, this being the page on which the amount received by McCall from the sale of the coal would have been shown if the pattern as to the Yankee Fighter records followed that of the Baylor Victory records (and in other respects it did). (Tr. 57-59, 827-829). Also, no copy of the selling invoice was produced. (Tr. 92-93). But the cash book showed the receipt on August 13, 1949 of $92,912.43 which Childs said was for the Yankee Fighter. (Tr. 94). The inland freig' ' bill for coal loaded on the Yankee Fighter was produ . stamped by McCall "Paid Jul 22 1949", as was . :Call's cancelled check to the Norfolk and Western Railway dated July

22, 1949 for $36,932.70 in payment thereof (Defendants' Exhibit 2, Plaintiff's Exhibit 7, Tr. 54). The shipping record showed the same figure for the freight. (Tr. 53). The dumping charge of Walter C. Maher was substantiated by McCall's cancelled check of July 21, 1949 to his order for $509.40 (Plaintiff's Exhibit 7). The shipping record also shows this (Tr. 53-54). Defendants' Exhibit 25 is similar, for the Yankee Fighter, to Defendants' Exhibit 26, for the Baylor Victory, and it arrives at a net selling price of $4.86 per ton for the Yankee Fighter coal, on which Whitewood was entitled to $4.47 per ton after deduction of 8% by McCall for its commission. In the light of the completeness of the proof as to the Baylor Victory coal, and the identical nature and treatment of the two ship transactions, the Special Master is not disturbed by the absence of the one sheet from the Yankee Fighter shipping records and the failure to produce a copy of the selling invoice. The available proof is of sufficient weight to be convincing.

By reason of plaintiff's suspicions as to the genuineness of the shipping records (Plaintiff's Exhibits 2, 3, 4, 5, 6 and 18), both sides brought on experts to testify, with the usual result, one witness said they were written up in 1949, the other said, no, some years later. Both gentlemen were learned and persuasive, but defendants' expert made comparisons with unquestioned contemporary records, and this fact gave his conclusions greater weight, causing the Special Master to find those records to be genuine contemporary records.

Jones and Cook in preparing, respectively, Plaintiff's Exhibit 19 and Defendants' Exhibit 24 excluded any consideration of the coal shipped in the Baylor Victory and the Yankee Fighter. The result is that, so far as the Special Master can find, no one testified as to what McCall actually paid Whitewood for that coal. The only reference thereto seems to be the statement on Defendants' Exhibits 25 and 26, "Price per net ton paid Whitewood Smokeless Coal Co. $4.85 — 8% $4.46". The difference between that figure and the $4.47 which

those exhibits show as Whitewood's entitlement being only one cent per ton on 5,957.85 tons ($59.58), and several fractional computations having been involved in arriving at that entitlement, the Special Master finds no intentional concealment, no lack of good faith, either as to reporting of prices or payment, in the Baylor Victory and Yankee Fighter transactions.

Forfeiture of Commissions

In addition to the recovery of all underpayments of the selling price less commission, Plaintiff seeks to recover in this action all commissions paid "on sales which were willfully and intentionally under reported by defendants". The law clearly requires that an unfaithful agent must lose both his profit and his commission. In *Sutherland v. Guthrie,* 86 W. Va. 208, 103 S.E. 298 (1920), the Supreme Court of Appeals of West Virginia has stated the proposition this way, at page 300:

> "The policy of the law is to put the faithful, honest servant in a little different class from the one who has been unfaithful to his trust, and it seems to be uniformly held that, where an agent so manages his principal's business as to secure to himself profits or advantages to which he is not entitled under his contract of agency, he will not only be required to surrender to his principal such advantages, but he will likewise be denied the right to receive the compensation to which he would have been entitled had he been honest and faithful in the performance of his duties. It may be said that the result of this doctrine would be to deny compensation for work actually performed, and such is the case; but it is also true that when one placed in the position of an agent takes the chance of deceiving his principal, and securing a larger part of the profits than he is entitled to, he must be willing to forfeit, in case he is discovered, even that to which he would otherwise be entitled."

See also *W. E. Deegans Coal Co. v. Hedrick*, 91 W. Va. 377, 113 S.E. 262 (1922).

Plaintiff's Exhibit 19 prepared by the witness Jones, and his testimony thereon, is the only evidence offered by any party as to the commissions that would properly have been McCall's, on all of the shipments as to which it underpaid Whitewood, if it had not so underpaid Whitewood. Jones found 1050 such instances involving 133,505.15 tons of coal, and he showed in a column headed "Commission Properly Deductible" the item here in question. His total for the item was $56,092.07. No question arose as to McCall having received those commissions. As is apparent from Plaintiff's Exhibit 19 and Defendants' Exhibit 24, there were other instances in which McCall reported properly and took its proper commission (630 such, according to Jones) or reported properly and took less than its proper commission — overpaid Whitewood (60 such, according to Jones). But for the instances where McCall took less than its proper commission, which the Special Master has found amount to $1,462.96, credit has been given in arriving at the *net* underpayments, so no further adjusting or "netting" is in order at this point. Therefore, the Special Master finds that the commissions actually received by McCall on the shipments as to which it underpaid Whitewood amounted to $56,092.07, that these were on sales willfully and intentionally under reported, and that plaintiff is entitled to recover such commissions from defendants.

American Southern Export Company—
Self-Dealing

In the summer of 1948 one Edward H. Post, an associate of C. A. Clyborne and of Jno. McCall Coal Company (its Vice President for some years, but whether before, during, or after 1948 is not made clear by the record) was instrumental in organizing a corporation called American Southern Export Company, hereinafter referred to as American Southern. He, one George H. Zimmerman, and one Foster Wood, Trustee,

were the stockholders, he said, as far as the company's books were concerned, but he was certain some of the stock was held for Clyborne and for McCall, Sr. Post said he himself was a small stockholder and that the rest of the stock was about equally divided between Zimmerman and Wood; that the Zimmerman stock "he guessed" and "assumed" was held for "the several members of the family of Mr. John McCall, Sr."; and that the Wood, Trustee, stock ("I wasn't supposed to know who the stock was being held for by Foster Wood, but I do know") "as I understand" was held for Clyborne and Perkinson — "But this was never known to me as a matter of record, only by word of mouth". (Tr. 466-469).

Clyborne denied that he owned any stock "directly" but admitted that he "had some indirectly" through a Washington lawyer, Foster Wood; and he denied any knowledge of any stock being owned by McCall, Sr., or "how he handled his affairs". (Tr. 183-184).

John McCall, Sr., who died in 1952, was the President of Jno. McCall Coal Company in 1948 and at that time his son, John McCall, Jr., later and now its President, was a trainee with the company. McCall, Jr., says Post was President of American Southern, and that Post worked for Jno. McCall Coal Company from about 1947 to about 1967, solely on commission, and was for some time its Vice President. He further says that he, McCall, Jr., owned about 11% of the American Southern stock which he bought from Zimmerman, and that his father had about 11%, but he denied knowledge of what stock, if any, Clyborne had in the company. He thought Zimmerman had a beneficial interest in about 5% of the stock Zimmerman held. (Tr. 1112-1119).

Perkinson knew about American Southern as an account to which coal was shipped, that Post was its President, and he believed McCall, Sr., was a stockholder, and "I believe Mr. Clyborne and I had a little stock in it". His only holding was "token", "nominal", and upon being asked why he had a token share of stock he replied "I really don't know". He did

not know whether or not Clyborne and McCall, Sr., owned most all of the stock; and other than those two persons, Post, and himself, he knew of no other stockholders. (Tr. 254-256).

Clearly they all knew of American Southern and that it was an intimately related enterprise. The degree of kinship is left uncertain, but no doubt it was substantial. Clyborne testified that neither Culbertson nor Franks was ever told or had reason to know that some of Whitewood's coal was being sold to American Southern. (Tr. 186-187). It was apparently defendants' vehicle for the sale of coal in the export market. (Tr. 187-188). It was short lived, liquidated in 1953 according to McCall, Jr. (Tr. 1117), and no one seemed to know much about its records or what became of them. The Special Master finds that the defendants effectively controlled American Southern and enjoyed substantially its business and its profits.

Therefore, the volume of Whitewood's coal that McCall sold to or through American Southern becomes relevant. Plaintiff's Exhibit 25, received without objection, is a schedule prepared by Persinger from McCall's books which purports to show that from August, 1948 through July, 1949, McCall sold 37,027.95 tons of Whitewood's coal to American Southern.

On the theory that he is entitled to recover any profit that defendants might have made, because of their interest of ownership in American Southern, on the Whitewood coal sold by McCall to American Southern, plaintiff offered his Exhibits 26 and 27, to which defendants objected and on which the Special Master reserved his ruling. Plaintiff's Exhibit 26 purports to show on the basis of bank statements of American Southern's account during the period August 1 to December 31, 1948, what American Southern got for its sales of coal generally and what it paid McCall. This exhibit is based upon so wide a range of conjecture as to make it completely inadmissible, and the Special Master accordingly sustains defendants' objection thereto. Plaintiff's Exhibit 27 purports to show prices of coal generally during

1949, what McCall got for all grades of coal, what it got for Whitewood's coal, and what it was paid by American Southern. The Special Master sustains defendants' objection to this exhibit as being so vague and general as to be irrelevant.

The absence of American Southern's records does not point to any guilty destruction of them — the company had been liquidated some twelve years before this action was brought — but without them there can be no proof of its profits. However, there is nothing in the record to suggest that it was not a profitable venture. McCall, at the time the self-dealing with Whitewood's coal through American Southern began, was operating with Whitewood on a commission of 20¢ per ton, which was increased shortly thereafter to 8% of selling price. It would seem logical to assume that American Southern did as well with its export sales as McCall's original 20¢ per ton. Any approach to this problem is at best speculative, and though there is no proof of what American Southern made on the coal in question, the Special Master is satisfied that it did profit and he believes that 20¢ per ton would represent a reasonable estimate. He therefore finds that on the 37,027.95 tons of Whitewood's coal that McCall sold to American Southern, the latter made a profit of 20¢ per ton, or $7,405.59, which plaintiff is entitled to recover from defendants for their undisclosed self-dealing.

As to the forfeiture of McCall's commission on the Whitewood coal it sold to American Southern, Plaintiff's Exhibit 38 shows that $9,610.38 of those commissions was in connection with sales to American Southern on which McCall underpaid Whitewood. Therefore, this $9,610.38 is included in the $56,092.07 that Plaintiff's Exhibit 19 and the testimony of Jones established as the total of commissions taken by McCall on *all* of the shipments as to which it underpaid Whitewood. (See the prior discussion herein under the heading "Forfeiture of Commissions"). The commissions shown by Plaintiff's Exhibit 38 which involved sales to American Southern on which there was

no underpayment total $6,908.63, against which $339.11 of overpayments shown on that exhibit should be credited, leaving a net figure of $6,569.52 for commissions collected by McCall on its sales of Whitewood's coal to American Southern and not included in the $56,092.07. There can be no double recovery of commissions, but the commissions which are attributable to McCall's sales of Whitewood coal to American Southern and which have not otherwise been allowed herein to plaintiff because of McCall's under reporting of prices, are recoverable by plaintiff, and the Special Master finds that they amounted to $6,569.52.

In connection with the above use of Plaintiff's Exhibit 38, it should be said that defendants objected when it was offered in evidence, primarily on the same grounds they raised as to Plaintiff's Exhibit 19 — failure to separate the outside coal and the leasehold coal. Ruling was reserved as to both exhibits, and thereafter, before the close of the hearings, the Special Master announced his decision to admit Plaintiff's Exhibit 19. He has likewise concluded that Plaintiff's Exhibit 38 should be admitted in evidence.

The Debit Memos

Plaintiff contends that certain charges made against Whitewood's account by McCall for penalties McCall had to pay on various Whitewood shipments must be strictly substantiated in the present accounting, that McCall's books and records fail to substantiate them, and that therefore he is entitled to recover those charges totalling $4,753.70. (Plaintiff's brief, and Tr. 773).

McCall did not produce its copies of debit memos nor could it produce supporting data for its book entries concerning them. (Tr. 130-131). See also the cross-examining of Persinger on this subject, (Tr. 792-800). The original of a debit memo is sent to one's customer, notifying him of a charge to his account. Whitewood received, and plaintiff had in hand at the hearings, all

of the debit memos in question. (Tr. 772-773). Obviously then, they were received in due course and were accepted without question by Whitewood. There was nothing hidden, nothing underhanded, about the contemporaneously announced fact that McCall was making a charge against Whitewood's account, nor as to why the charge was being made. The charges had to do with inferior quality per analysis of coal shipped and the debit memos showed that McCall had been penalized by its customer and that it was passing the penalty along to Whitewood. This is utterly different from the relationship between McCall and Whitewood relative to prices. If Whitewood thought its coal met the quality requirements which the debit memos themselves, *at the time,* said it did not meet, the question was out in the open and Whitewood should have acted *then.* The Special Master finds nothing in the evidence that tends in any way to discredit or cast doubt upon the propriety of the debit memo charges.

The Wage Increase

The evidence before the Court disclosed that in two instances Whitewood received from McCall substantial retroactive wage increases paid to McCall by the government for coal shipped by Whitewood. (Court opinion, page 24). Plaintiff's Exhibit 34 was offered, based upon information which Persinger found "on the back of the shipping records" of McCall, in connection with which the name "Whitewood Smokeless Coal Company", the words "wage increase", and the words "Highlands Crusader" appeared. Persinger said he "didn't know what it was", and "we are unable to explain that". Plaintiff's counsel thought it was up to McCall to explain it and said "We found this in their records". (Tr. 755-758). Defendants objected to this exhibit and the objection was sustained. There is nothing in the evidence before the Special Master that establishes, as a fact, any wage increase (other than the two paid to Whitewood as shown above) on which Whitewood was entitled to any payment by McCall. Here again the *fact* of any wage increase should have

been well-known to Whitewood. There could have been no secret about that, and if in fact there was a wage increase, Whitewood could at least have inquired about any entitlement to a resulting benefit. It was not shown that any inquiry was made. Although plaintiff's counsel continued to assert in his brief that there was something due to Whitewood, either as a wage increase payment or as a hidden profit by McCall, the claim remains unsupported and the Special Master finds that the defendants owe plaintiff nothing for any "wage increase" or matter related to any wage increase.

Interest

Plaintiff claims interest on the net underpayments as to coal shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955 and on the profit of American Southern Export Company on Whitewood's coal which was sold to American Southern Export Company by McCall during said period; and he claims such interest from the dates of the several transactions involved in each of those matters. With plaintiff's position that he is entitled to interest as to each of those matters the Special Master agrees. However, this being an accounting for a period of years ending December 31, 1955, during which the parties did business together continuously and had running accounts, it would be an impossible task from a practical standpoint to examine separately each transaction making up the items and compute interest on each of them for periods of time that would differ as to each of them. When one considers that in some 60 instances, at varying times, Whitewood was overpaid, and it appearing as a possibility, though there is no direct evidence on the point, that Whitewood might from time to time have been in a debit rather than a credit position (see Childs' comment at Tr. 118-119, 121, and Court Tr. 366-368) as was the actual practice in the case of Pine Oaks, a reasonable approach to the computation and award of interest would be to use the closing date of the accounting, at which point the accounts are netted out to a balance in favor of one party against the other party.

As to the rate of interest, the Special Master finds the general legal rate under West Virginia law as it stood at the close of the accounting period, 6% per annum, to be the proper and applicable rate.

Thus, interest from defendants on $56,279.87 (the sum of the underpayments, $48,874.28, and the profits, $7,405.59), calculated at the rate of 6% per annum from December 31, 1955 until paid, should be awarded to Whitewood.

Punitive Damages, Accountants' and Attorneys' Fees

Punitive damages are not awarded by courts of equity and the present action being equitable the Special Master finds that plaintiff is not entitled to punitive damages. *Given v. United Fuel Gas Co.*, 84 W. Va. 301, 99 S.E. 476 (1919); *Coca Cola Company v. Dixie Cola Company*, 155 F.2d 59 (CCA 4, 1946).

Counsel for plaintiff, recognizing the foregoing rule, suggests that in lieu of punitive damages, plaintiff might be awarded, as additional damages or as a part of his recoverable costs, his expenses incurred for accountant's and attorney's fees. To this end evidence was presented as to the charge of plaintiff's accountant Persinger, and Plaintiff's Exhibit 49 shows a charge by Persinger of $26,765.02. There was no showing as to counsel's charges, but Plaintiff's Exhibit 47 is the bill that plaintiff paid to attorneys in Washington, D.C., in connection with steps toward the taking of depositions from officials of the bank which carried the account of American Southern, the amount thereof being $438.66.

Extreme animosity has been exhibited on both sides in this case. This has been most unfortunate and the Special Master deems all parties equally guilty. Plaintiff's accountant went to remarkable lengths on suspicion that was never proved justified. Defendants' accountants pasted blue tape over records to mask and prevent anything about any transaction with another than Whitewood from being seen — again, suspicion.

True, plaintiff's road was a difficult one, and true, defendants resisted plaintiff's efforts at practically every turn, but the Special Master believes this to be a case where the normal approach of each party bearing his own costs, other than properly taxable court costs, should be followed. Nor would he recommend the taxing of any part of plaintiff's expenses for accounting or legal fees as costs to be borne by another party.

Defendants' Counter-claims and Defense of Laches

Defendants filed a counter-claim for the proceeds of coal mined from the leasehold and shipped to others than McCall, and for damages because of the coal Whitewood shipped to McCall which came elsewhere than from the leasehold, and for punitive damages in both regards; and they also filed a plea of laches as a bar to any recovery by plaintiff. In their brief, defendants tacitly abandon their counter-claims, and for reasons already herein made apparent, the Special Master finds against defendants on such claims. As to laches, the Special Master does not believe plaintiff's delay in asserting his claim worked to the disadvantage of defendants anymore than it operated to impose the bar of the statute of limitations against him. The Court has found that defendants' concealment tolled the running of the statute of limitations, and nothing in the evidence before the Special Master should, in his opinion, cause the Court to change that finding. Plaintiff did not unduly delay and thereby disadvantage the defendants, *after* he had reason to inquire and act, so as to bring laches into play. Nor was there anything in the attitude of Franks about coming into the case that is not perfectly clear and understandable. He was old, tired, weak and ill, and he wanted no part of a fight. This is not to say his testimony would have been unfavorable to Culbertson or that his refusal to join with Culbertson indicated disagreement with Culbertson's view of what had happened.

Dismissal as to C. A. Clyborne and Clyborne, Inc.

Defendants again assert in their brief that C. A. Clyborne and Clyborne, Inc., should be hence dismissed. The Court has already overruled a motion to that effect, and the Special Master declines now to recommend the granting of that motion.

Certain Other Exhibits

From the record it appears that Plaintiff's Exhibit 7 was offered in evidence (Tr. 88), whereupon counsel got into a discussion about making copies thereof and no formal action was taken by the Special Master on the offer. Thereafter, it was treated and referred to by the parties as though it had been formally received, nor did defendants register any objection at the time of the offer. Likewise, it appears that Plaintiff's Exhibit 9 was offered (Tr. 146), defendants did not object, and again, no action was taken on that offer. In order that the record may be clear, the Special Master has concluded that both of those exhibits are admissible; they are hereby received in evidence, and they have been considered in arriving at the findings herein set forth.

Defendants objected to the offer of Plaintiff's Exhibits 28 and 30 and the Special Master reserved his ruling as to each of them. He has now examined both exhibits and has reviewed the arguments of counsel concerning them, made at the time of offer. Plaintiff's Exhibit 28 relates in no way to any transaction with Whitewood and its purpose is to suggest that because it is claimed that American Southern reimbursed McCall for inland freight in some instances, it must follow that McCall was likewise reimbursed as to the inland freight loaded in the ships Baylor Victory and Yankee Fighter. The Special Master rejects Plaintiff's Exhibit 28 as being irrelevant and sustains defendants' objection thereto. Plaintiff's Exhibit 30 purports to show Whitewood's taxable profit (in some instances, loss) for each of the years in question as reported on its federal income tax returns, reduced to a per ton basis, and that

of course is based upon all of Whitewood's business transactions with whomsoever, not just with McCall; and the exhibit then purports to show for each of those years the tonnage shipped by Whitewood to McCall and McCall's commissions thereon. If its purpose is to show what Whitewood made or lost on its transactions with McCall, assuming such a showing would be relevant, it obviously does not do so, and the Special Master rejects this exhibit and sustains defendants' objection thereto.

Findings of Fact

The Special Master makes the following findings of fact:

1. During the period beginning July 1, 1948 and ending December 31, 1955, Whitewood shipped to McCall 246,014.10 tons of coal, all of which McCall accepted and sold to others.

2. The major portion of the tonnage shipped to McCall was mined by Whitewood from the leasehold described in the agreement of June 20, 1947 between J. H. Franks and C. A. Clyborne, as Lessors, and William M. Culbertson, Jr., and J. H. Franks, as Lessees (referred to herein as the "leasehold coal"); but a substantial portion of said tonnage so shipped was not coal mined by Whitewood from the leasehold, being, rather, coal which Whitewood purchased from others, mined elsewhere than from the leasehold (referred to herein as the "outside coal"). It is not possible to determine, and the plaintiff admits that he cannot show, exactly how much of the coal so shipped was leasehold coal and how much was outside coal.

3. McCall knew and consented to the shipping of outside coal to McCall by Whitewood, and neither McCall nor Whitewood made any distinction between the leasehold coal and the outside coal. Both McCall and Whitewood treated their transactions with each other as to all of the coal in the same manner.

4. There was an implied agreement between Whitewood and McCall that the same terms would apply to all of the coal shipped by Whitewood to McCall,

that is, that McCall, as sales agent for Whitewood, would account to Whitewood for the outside coal in the same way that the agreement of June 20, 1947 required it to account for the leasehold coal.

5. The relationship of the parties as to the outside coal which Whitewood shipped to McCall did not differ from their relationship in regard to the coal which Whitewood mined from the leasehold and shipped to McCall.

6. During the period in question, McCall shipped some 61 cars of Whitewood's coal in the name of others and some 22 cars of the coal of others in the name of Whitewood.

7. Almost immediately after the agreement of June 20, 1947 was executed, Whitewood began mining from the leasehold, and with the full knowledge and approval of defendants shipped nearly 15,000 tons of leasehold coal to others than McCall before making its first shipment of such coal to McCall in July of 1948. By January, 1949, with like knowledge and approval, the total shipments of leasehold coal by Whitewood to others had reached something more than 22,000 tons.

8. During the period beginning July 1, 1948 and ending January 31, 1949, McCall paid Whitewood in every instance the full proceeds of its sales of Whitewood's coal less the agreed selling commission; and between the latter date and December 31, 1955, there were some 600 additional instances in which the full proceeds of the sale less the agreed selling commission was paid.

9. During the period beginning July 1, 1948 and ending December 31, 1955, McCall, in numerous instances, paid Whitewood for its coal an amount greater than the full proceeds of sales less the agreed selling commission, the total of these "overpayments" being $1,462.96.

10. During the period beginning July 1, 1948 and ending December 31, 1955, there were 1,050 transactions on which McCall paid Whitewood for its coal an amount which was less than the full proceeds of sale

minus the agreed commission, the total of these "underpayments" being $50,337.24.

11. During the period beginning July 1, 1948 and ending December 31, 1955, the net underpayment by McCall to Whitewood (Finding 10 minus Finding 9) for all of the coal shipped by it to and sold by McCall was $48,874.28. This figure takes into consideration all of the coal mined by Whitewood from the leasehold and shipped by it to McCall during said period, and all of the coal mined on property other than the leasehold, and purchased by Whitewood, and shipped by Whitewood to McCall during said period.

12. In June and July, 1949, McCall loaded 2,653.25 tons of Whitewood's coal, mixed by McCall with coal produced by others, in the ship Baylor Victory and 3,304.60 tons thereof, likewise so mixed, in the ship Yankee Fighter, both of which were for export on government contract. McCall received as gross selling price for the Baylor Victory $90,292.07, paid without reimbursement $35,916.68 for inland freight and $495.03 for dumping charges, and realized a net selling price of $4.86 per ton for the Baylor Victory coal. Its proper commission from Whitewood at 8% of that price was 39 cents per ton. McCall received as gross selling price for the Yankee Fighter $92,912.43, paid without reimbursement $36,932.70 for inland freight and $509.40 for dumping charges, and realized a net selling price of $4.86 per ton for the Yankee Fighter coal. Its proper commission from Whitewood at 8% of that price was 39 cents per ton.

13. The McCall shipping records introduced in evidence as to the Baylor Victory and the Yankee Fighter are genuine, and the entries therein were made in the due course of McCall's business at or about the time of the transactions they reflect and record.

14. As to the ships Baylor Victory and Yankee Fighter there was no intentional concealment or lack of good faith on the part of defendants, either in the reporting of prices to Whitewood or the payments made to Whitewood for its coal loaded in those ships.

15. The commissions deducted by McCall from its settlements with Whitewood in those instances where it "underpaid" Whitewood (Finding of Fact No. 10 above) amounted to $56,092.07, and all of such commissions were on sales as to which the selling prices were willfully and intentionally under reported to Whitewood.

16. During the period here in question, McCall sold 37,027.95 tons of Whitewood's coal to American Southern Export Company, and a reasonable estimate of the profit realized by American Southern on its resale of that coal is 20 cents per ton. The defendants, some of them directly and others of them indirectly, had interests of ownership in American Southern and they effectively controlled American Southern and enjoyed substantially its business and its profits. Neither the plaintiff nor his partner J. H. Franks was ever told by any of the defendants nor did either of them have reason to know that any of Whitewood's coal was being sold by McCall to American Southern.

17. The commissions deducted by McCall from its settlements with Whitewood for the coal sold to American Southern, exclusive of such as are included among the commissions referred to in Finding of Fact No. 15 and after credit of $339.11 for overpayments to Whitewood on American Southern sales, amounted to $6,569.52.

18. The debit memorandum charges made by McCall on its books against Whitewood during the period here in question totalled $4,753.70, represented proper charges as to which Whitewood was at the time properly informed, and are properly allowable to McCall in its accounting to Whitewood.

19. Plaintiff failed to prove or to show in any way that any retroactive wage increase was paid to McCall by the United States for coal shipped by Whitewood, other than in the two instances where credit therefor was duly entered in the McCall books on the Whitewood account and for which Whitewood was fully paid.

20. Plaintiff did not unduly delay to the disadvantage of defendants in commencing this action, after he had reason to inquire and act.

Conclusions of Law

1. Under the written agreement of June 20, 1947, as modified from time to time by the parties, and the subsequent implied agreement between Whitewood and McCall that the terms of the written agreement would apply to all of the coal shipped by Whitewood to McCall, McCall acted in a fiduciary capacity as agent for Whitewood in the selling of such coal, and is accountable to Whitewood for the price at which it sold all of the coal mined on the leasehold and shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955, and all of the coal mined on property other than said leasehold, and purchased by Whitewood, and shipped to McCall during said period.

2. Neither the West Virginia statute of limitations nor the defense of laches is available to defendants in bar of plaintiff's claims asserted in this action.

3. McCall underpaid Whitewood in the amount of $48,874.28 for the coal shipped by Whitewood to McCall during the period July 1, 1948 to December 31, 1955, and defendants are indebted to plaintiff in that amount.

4. Plaintiff is entitled to interest on the aforesaid $48,874.28 at the rate of 6% per annum from December 31, 1955 until paid.

5. McCall was not entitled, by reason of its improper conduct, to deduct the otherwise proper commissions in the amount of $56,092.07 for the transactions in which it underpaid Whitewood during the period July 1, 1948 to December 31, 1955, and defendants are indebted to plaintiff in that amount.

6. By reason of their undisclosed self-dealing in the sale of Whitewood's coal to American Southern Export Company during the period July 1, 1948 to December 31, 1955, defendants are indebted to plaintiff in the sum of $7,405.59.

7. Plaintiff is entitled to interest on the aforesaid $7,405.59 at the rate of 6% per annum from December 31, 1955 until paid.

8. McCall was not entitled, by reason of the relationship that existed between defendants and American Southern, to deduct the otherwise proper commissions in the amount of $6,569.52 (exclusive of such as are included among the commissions referred to in Conclusion of Law No. 5 above) for its sales of Whitewood's coal to American Southern during the period July 1, 1948 to December 31, 1955, and the defendants are indebted to plaintiff in that amount.

9. McCall accounted properly and fully to Whitewood for the Whitewood coal loaded in the ships Baylor Victory and Yankee Fighter, and defendants owe nothing to plaintiff for that coal.

10. Defendants owe nothing to plaintiff by reason of the debit memorandum charges made by McCall on its books against the account of Whitewood.

11. Defendants owe nothing to plaintiffs for any "wage increase" or matter related to any wage increase.

12. Plaintiff is not entitled to recover punitive damages from defendants in this action.

13. Plaintiff owes nothing to defendants on account of coal mined from the leasehold described in the agreement of June 20, 1947 and shipped by Whitewood to others than McCall during the period June 20, 1947 to December 31, 1955, or as damages because of coal shipped by Whitewood to McCall which came elsewhere than from the leasehold; nor are defendants entitled to recover punitive damages from plaintiff in this action.

Respectfully submitted,

W. T. HANCOCK,
Special Master.

MEMORANDUM DECISION AND JUDGMENT ORDER

CHRISTIE, District Judge:

The Special Master having filed his report and the parties having noted their objections and exceptions thereto, the Court, after careful consideration of the objections and exceptions and of the record in this case, is of the opinion that the findings of fact of the Special Master, viewed in the light of the requirement of Rule 53(e)(2) of the Federal Rules of Civil Procedure that the Court "accept the Master's findings of fact unless clearly erroneous," are supported by the evidence and that the conclusions of law set forth in the report correctly apply the relevant legal principles. It is accordingly hereby ORDERED that said report be, and it is, hereby confirmed as filed.

RULINGS ON EXCEPTIONS AND OBJECTIONS

William M. Culbertson, Jr.'s
Objections to the Master's Report.

(1) The Court overrules the objection of William M. Culbertson, Jr., to the Master's disallowance of his claim for an award of counsel fees for the following reasons:

Culbertson takes the position, and argues persuasively, that inasmuch as the present action is of the type formerly cognizable as a proceeding in equity and involves fraudulent misrepresentation and concealment by one acting in a fiduciary capacity, this Court, exercising its equity jurisdiction, has the power to award plaintiff counsel fees.

Although in this country the general rule is that, in the absence of a statute or enforceable contract, attorney's fees are not ordinarily recoverable as either costs or as an item of damages, *Fleischmann Distilling Corporation v. Maier Brewing Co.*, 386 U.S. 714, 717 (1967), nevertheless, in "exceptional cases and for dominating reasons of justice," federal courts exercising their "historic equity jurisdiction" may allow

counsel fees and other expenses incurred in litigation but not included in the ordinary taxable costs recognized by statute. *Sprague v. Ticonic National Bank,* 307 U.S. 161, 164-167 (1939). See also *Guardian Trust Co. v. Kansas City Southern Ry. Co.,* 28 F.2d 233 (8th Cir. 1928). Conceding the power to award attorney's fees, and assuming that the facts of the present case bring it within that class of exceptional cases where, for dominating reasons of justice, the court would be justified in awarding fees, the question remains whether in the context of this case — a case based upon a state-created cause of action and instituted in this court on the basis of diversity jurisdiction — the court would be justified in awarding counsel fees.

It seems clear that if this action had been instituted in a state court, counsel fees would not have been allowed. The West Virginia rule with respect to the allowance of counsel fees was stated by the Court in *Roach v. Wallins Creek Collieries Co.,* 111 West Virginia 1, 8, 160 S.E. 860 (1931), as follows:

> "Except in rare instances the power of a court to require one party to contribute to the fees of counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which inures to the common benefit of all." See also *Security National Bank & Trust Company v. Willim,* 180 S.E.2d 46 (W. Va. 1971), and cases cited therein.

The decision in *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938), and its progeny, expresses the firm federal policy applicable to this case that, as stated by Mr. Justice Frankfurter in *Guaranty Trust Company of New York v. York,* 326 U.S. 99, 109 (1945),

> ". . . in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

The Supreme Court recognized in *Cohen v. Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949), that a provision under state law which provided that an unsuccessful plaintiff in a stockholder's derivative suit should be liable for the expenses of the corporation and other defendants, constituted more than a "mere procedural device," and, accordingly, held that the state statutory provision was enforceable in a diversity action brought in federal court. In our opinion, the converse of this situation (where counsel fees may be awarded in a diversity action in federal court but not in the state court), presents equally compelling reasons for the application of the principles set forth in the *Guaranty Trust* case. To disregard West Virginia law in this case would significantly affect the result of the litigation — a consequence which, under the body of law developed since the decision in *Erie v. Tompkins, supra*, federal courts must strive to avoid.

The Court finds support for this conclusion in *Sperry Rand Corporation v. A-T-O, Inc.*, 447 F.2d 1387 (4th Cir. 1971). In the *Sperry Rand* case, involving both legal and equitable claims, the defendants willfully and deliberately and in breach of "loyalty, fidelity and responsibility" to their employer, misappropriated trade secrets and bidding data. The Court noted the general rule stated by Professor Moore in his treatise, 6 Moore's Federal Practice, § 54.77[2], at pp. 1712-1713, that "in an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." Applying this principle, the Court held Virginia law applicable and reversed the judgment of the district court allowing plaintiff counsel fees. See also 3 Barron and Holtzoff, Federal Practice and Procedure, § 1197 at p. 68.

(2) The Court overrules objection of William M. Culbertson, Jr., to the Master's disallowance of his claim for an award for accounting expenses for the following reasons:

The general rule, applicable in federal court, is that compensation paid an expert witness in excess of the statutory attendance per diem fee, mileage and subsistence allowance when warranted, is not a taxable cost. *Thorn v. Bryant,* 52 F.R.D. 25 (W.D. N.C. 1970); 6 Moore's Federal Practice, § 54.77 [5.-3]. Similarly, accountants and investigators' fees incurred in the preparation of a case are disallowed. *Advance Business Systems & Supply Company v. S C M Corporation,* 287 F. Supp. 143, 164 (D.C. Md. 1968), modified on other grounds, 415 F.2d 55, cert. den. 397 U.S. 920 (1970); 6 Moore's Federal Practice, § 54.77 [8] at p. 1751. Though federal courts exercising diversity jurisdiction, in a few instances, have applied state law with respect to the allowance of fees and expenses of expert witnesses, *Henning v. Lake Charles Harbour and Terminal District,* 387 F.2d 264 (5th Cir. 1968), we find no support under West Virginia law for the awarding of such costs. Indeed, the West Virginia cases discussing this question indicate that, under West Virginia practice, the court is limited to taxing those expenses which are specifically provided by statute. See *Humphrey Manufacturing Co. v. City of Elkins,* 93 W. Va. 16, 26, 115 S.E. 846 (1923). A review of the applicable West Virginia rules and statutes fails to disclose any provision for the taxing of compensation paid an accountant. West Virginia Code, Chapter 59, Article 2, Section 1, et seq.; Rule 54(d), West Virginia Rules of Civil Procedure. Thus, whether federal or state rules are applied, plaintiff is clearly not entitled to be reimbursed for compensation paid to his accountants.

An additional reason exists for disallowing the accountants' expenses in the present case and that reason relates to the finding by the Master to the effect that counsel for plaintiff, as well as counsel for defendants, expended needless time and effort on matters which were not germane to the issues in the case. While the Master was justifiably critical of defendants' effort to frustrate plaintiff in his attempts to recover relevant evidence, the Master also found that plaintiff's accountants "went to remarkable lengths on suspicion that

was never proved justified." The difficult issue of determining the appropriate amount to award for the accountants' expenses, even if such an award were appropriate, is thus complicated, as well as confused, by plaintiff's own conduct. Under such circumstances, this Court, in the exercise of its discretion, would feel compelled to deny allowance for such expenses even though it should feel that, under applicable law, such fees were ordinarily allowable. See *Lee National Corporation v. Kansas City Southern Industries, Inc.*, 50 F.R.D. 412 (S.D. N.Y. 1970).

(3) The Court overrules objection of plaintiff to the Master's allowance of twenty cents per ton damages on Whitewood coal sold by McCall to American Southern Export Company and resold by that company for the following reasons:

The evidence clearly supports the finding of the Master that defendants effectively controlled American Southern Export Company and, in accordance with the applicable principle of law that an unfaithful agent must account to his principal for both his compensation and any profits he may have made by such self-dealing, *Sutherland v. Guthrie,* 86 W. Va. 208, 103 S.E. 298 (1920), the Master required defendants to account to plaintiff for the profit made by American Southern on the Whitewood coal sold by McCall to American Southern and subsequently resold by the latter company. The Master fixed the American Southern profit at twenty cents per ton. Plaintiff objects to this figure, asserting that evidence which he attempted to introduce, specifically Exhibits 26 and 27, established that American Southern made a greater profit than the twenty cents per ton allowed by the Master. Upon examination of the record, the Court finds itself in agreement with the Master's ruling excluding these two exhibits. To deduce the price per ton of the Whitewood coal sold by American Southern from the figures produced by plaintiff would, as stated by the Master, involve speculation based upon conjecture. An evidentiary fact may not be established in such manner.

With regard to the propriety of the Master's award of twenty cents per ton as damages, the Court is mindful, as was the Master, of the rule prohibiting an award of damages based upon "mere speculation." However, under the facts of this case, it is clear that plaintiff is entitled to recover, as part of his damages, the profit made by American Southern on the coal sold to it by McCall, the only uncertainty being with respect to the extent of such recovery. Under these circumstances, plaintiff is not denied all relief, for, as pointed out by the Court in *Story Parchment Company v. Paterson Parchment Paper Company,* 282 U.S. 555, 563 (1931), ". . . while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate." As also pointed out by the Court in *Paterson,* the rule with respect to "certainty" of damages, refers not to the amount of such damages, but to the measure of proof necessary to establish the fact that a party has sustained *some* damage. See also *Palmer v. Connecticut Railway & Lighting Company,* 311 U.S. 544 (1941). Under the circumstances of the instant case, the Master's finding of a profit of twenty cents per ton, based upon the McCall commission on sale of Whitewood coal during the same period of time, is clearly the best approximation of Southern Export's profit and is thus the best measure of plaintiff's recovery with respect to this particular item of damages.

Jno. McCall Coal Company, Inc., Clyborne, Inc., and C. A. Clyborne's Exceptions to the Master's Report.

The exceptions of the defendants to the report of the Master are purely factual, with the possible exception of defendants' objection to the finding of the Master with regard to the profit derived by American Southern from its sales of Whitewood coal — a finding previously approved by this court.

The Court has reviewed much of the evidence presented to the Master on previous occasions and to

restate the facts again at this stage in the litigation would serve no useful purpose. See *Culbertson v. Jno. McCall Coal Company, Inc.*, 275 F. Supp. 662 (S.D. W. Va. 1967). It is sufficient for the present to state that the Court has reviewed the findings of the Master with respect to both the defendants' liability and plaintiff's damages and finds that the Master's findings of fact are clearly supported by the evidence and that the Master has correctly resolved the issues of law presented. On the basis of this review, the Court adopts the findings and conclusions of the Master as its own and, accordingly, overrules each and every exception of the defendants to the Master's report.

RECAPITULATION

In accordance with the report of the Master, which is hereby ORDERED confirmed and adopted in all respects, it is further more particularly ADJUDGED and ORDERED as follows:

1. That plaintiff shall recover of and from the defendants the sum of $48,874.28, being the amount McCall underpaid plaintiff for coal shipped by Whitewood to McCall from July 1, 1948 to December 31, 1955, together with interest thereon at the rate of 6% per annum from December 31, 1955 until paid;

2. That plaintiff shall recover of and from the defendants the sum of $56,092.07, being the commission paid by Whitewood to McCall on coal sales in which McCall underpaid Whitewood during the period of July 1, 1948 to December 31, 1955;

3. That plaintiff shall recover of and from the defendants the sum of $7,405.59, being the profit estimated to have been received by American Southern Export Company from the sale of Whitewood coal, together with interest thereon at the rate of 6% per annum from December 31, 1955 until paid;

4. That plaintiff shall recover of and from the defendants the sum of $6,569.52, being the commissions, other than such as are included in the $56,092.07 noted

above, for sales of Whitewood coal by McCall to American Southern Export Company during the period of July 1, 1948 to December 31, 1955; and

5. That a judgment be, and it is, hereby rendered against the defendants in favor of the plaintiff for the aggregate of the aforesaid recoveries and interest accrued thereon to the date of this judgment order (W. Va. Code 56-6-29), which aggregate sum is determined by the court to be $176,196.80, together with interest thereon from the date of this order until paid and the plaintiff's proper costs, as provided by law; provided, however, that the force and effect of this judgment as it relates to the defendant, Vernice H. Clyborne, Executrix of the Will of C. A. Clyborne, deceased, shall be and is hereby limited to the personal estate of C. A. Clyborne, deceased, in, or which shall come to, the hands of his said executrix to be administered by her, as provided by W. Va. Code 56-6-33.

It is further hereby ADJUDGED and ORDERED that the plaintiff shall take nothing of the defendants (a) for the Whitewood coal loaded in the ships Baylor Victory and Yankee Fighter, (b) by reason of the debit memorandum charges made by McCall on its books against the account of Whitewood, (c) for any "wage increase" or matter related to any wage increase, or (d) for punitive damages, all as found by the Master in Items 9, 10, 11, and 12 of his "Conclusions of Law." Nor shall the defendants have any recovery against the plaintiff on their counterclaim as determined by the Master (see p. 30, Master's Report).

The Special Master is hereby directed to file with the Court, within the next thirty (30) days, a petition for the allowance to him of reasonable compensation for the services he has rendered in this matter, setting forth therein in detail the amount of time devoted thereto and any expenses he incurred in connection therewith, and what, in his opinion, would fairly and justly compensate him for his work. The Master shall serve a copy of said petition on counsel of record and if any counsel shall desire to object to the amount of time or money

claimed therein or on any other basis, he shall file such objection in writing within fifteen (15) days from the service date of the petition. The Court will determine whether a hearing on such objection, or objections, is indicated. Absent any objections to the said petition, the Court will proceed to consider it and make its own determination as to what would be fair and just compensation to the Master for the services rendered and enter the same of record.

The Court will take this opportunity to express its appreciation to the Master for his expeditious handling of the assignment and to compliment him upon the preparation of what is obviously a very meticulous, objective and skilful report.

The Clerk is directed to serve, by United States Mail, an attested copy of this Memorandum Decision and Judgment Order upon counsel of record.

Enter: December 15, 1972

SIDNEY L. CHRISTIE,
United States District Judge.

OPINION

BOREMAN, Senior Circuit Judge:

The facts of this diversity suit are voluminous and complex. They are set forth in great detail in the district court's opinion reported at 275 F. Supp. 662 (S.D. W.Va. 1967), and we think it unnecessary to fully repeat them here. A brief statement thereof should suffice.

William M. Culbertson, Jr. (plaintiff below), and J. H. Franks, doing business as Whitewood Smokeless Coal Company (Whitewood), had acquired by lease certain mining rights to coal in Buchanan County, Virginia. As part of the leasing agreement one C. A. Clyborne was to be the exclusive sales agent for the sale of the mined coal on a commission basis. Clyborne immediately assigned his rights as sales agent to Jno. McCall Coal

Company, Inc. (McCall), who in turn made arrangements with Clyborne, Inc., to act as sales agent in return for a share of the commissions. From July 1, 1948, to December 31, 1955, during the term of the lease agreement, the accounting entries in Whitewood's books were consistent; they reflected the receipt of the sales price less the established commission supposedly taken by McCall. This would indicate that Whitewood dealt with and viewed McCall solely as a sales agent. McCall's accounting procedures, however, were less definitive. Some entries would indicate that McCall treated itself as a wholesaler, being required to pay a reported purchase price to Whitewood and free to make profits on any higher resale price. Other entries indicate that McCall considered itself a sales agent for Whitewood, entitled only to a commission. In 1963 evidence surfaced which caused Culbertson to file this action seeking an accounting of the proceeds from the sale of Whitewood's coal. Clyborne, McCall, and Clyborne, Inc. (defendants below), claim that the sales agency relationship was terminated by mutual agreement in February of 1949, and as wholesalers after that date they were not required to account for any money they received from the resale of Whitewood's coal. Culbertson contends that the sales agency relationship was never terminated and that defendants were required to remit the full sales price less the established commission.

In its findings of fact the district court found: the sales agency agreement had never been terminated; Culbertson believed, and with full justification, that McCall's capacity was that of a sales agent and not a wholesaler; during the entire period Culbertson had no reason to believe or suspect that McCall was not accounting to Whitewood for the full proceeds of sales less the agreed commission; McCall had withheld sales proceeds in violation of the agreement; and McCall misrepresented and concealed from Culbertson the true prices obtained from the sales of the coal. The court ruled as a matter of law that Culbertson's action was not barred by the applicable West Virginia statute of

limitations and held that McCall's misrepresentations and concealment so obstructed Culbertson's right of action, within the meaning and intent of West Virginia Code ch. 55, art. 2, § 17,[1] that the running of the statute of limitations was tolled. McCall was ordered to produce its books and records for examination and audit. A Special Master was appointed to determine the appropriate award of damages and he concluded that Culbertson was entitled to an award of a sum in excess of $170,000. The district court subsequently adopted the Master's report in all respects and refused Culbertson's request for attorney's fees and accounting costs.

In their appeal the defendants-appellants claim the district court erred in finding that the sales agency agreement had not been terminated in February of 1949 and in finding that there were misrepresentations and concealment by McCall which obstructed Culbertson's prosecution of his claim. In both instances they challenge the correctness of the findings of fact.

In reviewing a district court's findings of fact this court must follow Rule 52(a) of the Federal Rules of Civil Procedure.

> "Findings of fact shall not be set aside unless clearly erroneous. . . ."

Findings of fact are presumptively correct and cannot be set aside unless clearly erroneous. *Crowe v. Cherokee Wonderland, Inc.*, 379 F.2d 51 (4 Cir. 1967).

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

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[1] West Virginia Code ch. 55, art. 2, § 17 provides in part:

> Where any such right as is mentioned in this article shall accrue against a person . . ., if such person shall, . . . by absconding or concealing himself, *or by any other indirect ways or means, obstruct the prosecution of such right,* or if such right has been or shall be hereafter obstructed by war, insurrection or rebellion, the time that such obstruction may have continued shall not be computed as any part of the time within which the said right might or ought to have been prosecuted. . . . [Emphasis supplied.]

> on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Neither our review of the record nor any point raised on appeal leaves us with a definite and firm conviction that a mistake was committed by the district court in its factual findings and we cannot say that they are clearly erroneous. We therefore find no merit in this aspect of the appeal.

Culbertson[2] has cross-appealed, alleging that the district court erred in disallowing the claim against McCall for recovery of attorney's fees and accounting costs. The district court concluded that had this case been tried in state court no litigation expenses could have been recovered and that the state rule with respect to such expenses should be followed in diversity cases. We previously considered this question in *Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387 (4 Cir. 1971), and concluded that in diversity cases state law should ordinarily be followed. In that case we set aside an award of attorney's fees by the district court because under Virginia law, which law was there held to be controlling of substantive issues, no award of such fees was authorized.[3]

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[2] William M. Culbertson, Jr., died while this case was pending on appeal. Ruth M. Culbertson, executrix of the will of William M. Culbertson, Jr., was substituted as a party to this appeal.

[3] Our decision in Sperry Rand Corp. v. A-T-O, Inc., 447 F.2d 1387 (4 Cir. 1971), was bottomed upon Virginia law as stated in McCormick v. Elsea, 107 Va. 472, 59 S.E. 411 (1907). In Roach v. Wallins Creek Collieries Co., 111 W.Va. 1, 160 S.E. 860 (1931), the West Virginia Supreme Court of Appeals adopted the Virginia rule with respect to awarding attorney's fees as set forth in McCormick v. Elsea, *supra*. Our decision in *Sperry Rand* is therefore persuasive authority for our decision in the instant case.

The West Virginia rule is that "[e]xcept in rare instances the power of a court to require one party to contribute to the fees of counsel of another party must be confined to cases where the plaintiff, suing in behalf of himself and others of the same class, discovers or creates a fund which inures to the common benefit of all . . . ." *Roach v. Wallins Creek Collieries Co.*, 111 W. Va. 1, 8, 160 S.E. 860, 863 (1931); *see also Security National Bank & Trust Co. v. Willim*, ___ W. Va. ___, 180 S.E.2d 46 (1971). There is no indication that an action based upon fraud would constitute a "rare instance" which under West Virginia law would justify the awarding of attorney's fees.[4] "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." 6 J. Moore, Federal Practice § 54.77[2], at 1712 (1974) (footnotes omitted); *see also Kellems v. California CIO Council*, 6 F.R.D. 358 (N.D. Cal. 1946). The facts of this case do not justify departure from that principle. We conclude that the district court committed no error in following West Virginia law in denying recovery of attorney's fees. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945).

Accordingly, we affirm the judgment entered below. Each side shall bear its own costs.

Affirmed

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[4] The litigation expenses sought by Culbertson include both attorney's fees and accounting costs. As the district court noted, whether state law [Allen v. Colonial Oil Co., 92 W. Va. 689, 115 S.E. 842 (1923)] or federal law [6 J. Moore, Federal Practice § 54.77[8], at 1751 (1974)] is applied, there is no authority for awarding accounting costs in cases such as this. There is, therefore, no merit in the appeal from the denial of accounting costs. Accordingly, we limit our discussion to the denial of attorney's fees.

ORDER

Appellants have filed their Petition for Rehearing with the conditional suggestion and request that "if the panel which heard this matter does not grant a rehearing, then this request should be considered in banc."

Upon consideration of the Petition by the panel, with the consent and approval of Judge Winter and Judge Russell, it is

ORDERED that said Petition be, and the same hereby is, denied, and all other members of the court in regular active service having been advised of the determination by the panel that the Petition should be denied and no judge having requested a vote on the suggestion for a rehearing in banc,

Now, therefore, it is further ORDERED that the conditional request for rehearing in banc be, and the same hereby is, denied.

HERBERT S. BOREMAN,
Senior United States
Circuit Judge.